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ABSTRACT

This master's thesis synthesizes literature on the teaching of the United States Constitution, analyzes the Supreme Court case of Westside Community Schools v. Mergens, 1990, and provides lesson plans for teaching the constitutional significance of this case. The thesis argues that because of the poor quality of textbooks and the inadequate training of teachers, the U.S. educational system is failing to inculcate basic constitutional principles in secondary school students. Greater use of technology, community resource persons, primary documents, case studies, cooperative learning, concept maps, and global perspectives are advocated. For a case study that will excite student interest, the Mergens case, which involves a recent piece of federal legislation, the Equal Access Act of 1984, that pertains directly to secondary school students is suggested. In the case, the Supreme Court upheld the right of students at Westside High School in Omaha, Nebraska to meet for Bible discussion during noninstructional time. It is essential for the successful introduction of case studies that teachers are provided with the historical and constitutional background of the case. (JD)

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TEACHING AND LEARNING ABOUT
THE UNITED STATES CONSTITUTION IN
AMERICAN SECONDARY SCHOOLS

by

Thomas S. Vontz

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A THESIS

Presented to the Faculty of
The Graduate College at the University of Nebraska
In Partial Fulfillment of Requirements
For the Degree of Master of Secondary Teaching

Major: Curriculum and Instruction

Under the Supervision of Professor F. William Sesow

Lincoln, Nebraska

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Thomas S. Vontz, M.S.T.

University of Nebraska, 1993

Adviser: F. William Sesow

The American electorate and American secondary school students are remarkably uninformed about the central document in American culture--the United States Constitution. The purpose of the study is to present a synthesis of relevant literature that concentrates on teaching and learning about the Constitution; to analyze and trace, in historical form, the development of one significant Supreme Court case--Westside Community Schools v. Mergens (1990); and to provide discussion and sample lesson plans of possible ways to teach about the case and its constitutional significance.

The American educational system is failing to inculcate basic constitutional principles in American secondary school students. To this extent, Chapter I focuses on the small number of studies, articles, and speeches that have been produced on the topic of constitutional instruction. Teachers relying on poorly written textbooks who are not adequately prepared to teach about the Constitution are at the root of the problems associated with constitutional education. Educators who begin to rely more on technology, community

resources, primary documents, and case studies will be the ones responsible for raising the scores on "America's civics report card."

A case study, Westside Community Schools v. Mergens (1990), and its history is provided in Chapter II. Relying on primary and secondary sources as well as interviews with key characters involved in the case, Chapter II highlights issues that would be useful and important to secondary social science educators.

Finally, Chapter III analyzes potential methods of instruction to be used by teachers who choose Westside Community Schools v. Mergens as a way of conveying constitutional principles. The discussion and lesson plans provided are consistent with the research and history found in Chapters I and II.

This thesis is intended to add to the small body of literature which focuses on teaching and learning about the Constitution in secondary schools.

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attracted me to the teaching profession. His memory will forever inspire those who knew him.

T.S.V.

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CHAPTER I

IDENTIFIED PROBLEMS IN CONSTITUTIONAL EDUCATION AND POSSIBLE IMPROVEMENTS IN CONSTITUTIONAL EDUCATION

Introduction

The purpose of this study is to present a synthesis of relevant literature which concentrates on teaching and learning about the United States Constitution; to analyze and trace in historical form, the development of one significant Supreme Court case--Westside Community Schools v. Mergens; and provide a discussion and example lesson plans of possible ways to teach about the case and its constitutional significance. This study is intended to add to the small body of literature that focuses on teaching or learning about the United States Constitution in American secondary schools.

Although 74% of Americans believe otherwise, the United States Constitution does not guarantee public or private education (Hearst Report, 1987). Education was not in the delegated powers of Congress, not in the Bill of Rights, or in any of the amendments. This should not be mistaken as an embarrassing oversight, or a representation of educational apathy among the founders. On the contrary, many founders recognized the fundamental significance of a populous well educated in the principles and ideas upon which the United States government rests. As Thomas Jefferson wrote to James Madison on December 20, 1787 (cited in Patrick, 1991): "Above all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty." James Madison also recognized the importance of an educated and informed electorate. Madison wrote in a letter to William T. Berry on August 4, 1822 (cited in Patrick, 1991):

> A popular government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power knowledge gives . . . What spectacle can be more edifying or more seasonable, than that of Liberty and Learning, each leaning on the other for their surest and mutual support?

The importance and virtue of civic and constitutional education was recognized early in the history of the United States.

In keeping with the ideals of the founders, every school district in the United States teaches about the United States Constitution. Most teach it several times throughout a K-12 curriculum with varying degrees of zeal (Patrick, 1991). Despite the Constitution's central importance to civic education and the opportunity to learn about it, two studies, one by the Hearst Corporation (1987) and another by the National Assessment of Educational Progress (NAEP) (1988), clearly indicate that American schools are not adequately teaching about the Constitution:

- A majority of American adults (59%) did not know the Bill of Rights is "the first ten amendments to the Constitution" (Hearst Report, 1987).

- Nearly half of the American public (49%) believed that the President can suspend the Constitution in the event of war or national emergency (Hearst Report, 1987).
- A vast majority of Americans (82%) think the Gettysburg Address phrase "of the people, by the people, for the people" is found in the Constitution (Hearst Report, 1987).
- Nearly half of American adults (45%) confused the Marxist maxim, "From each according to his ability, to each according to his need," as being a part of the Constitution (Hearst Report, 1987).
- Only 17% of fourth graders and 41% of eighth graders recognized that the Supreme Court has the power to declare a law unconstitutional (NAEP, 1988).
- A representative sample of 17 year olds showed a dismal average of 54.5% on the subsection which tested constitutional history (NAEP, 1988).

There are some areas of constitutional knowledge about which the American public seems to be well informed. For example, the rights of an accused person or the basic process by which the Constitution is amended (Hearst Report, 1987). However, taken together these statistics generate an uneasy feeling in educators and noneducators alike. Historian Michael Kammen (1986), in examining the constitutional knowledge of American adolescents and adults from the mid-1940s through the mid-1980s, described his findings as a "persistent pattern of ignorance" (p. 43).

Without a doubt, there is a clear need for research and study in the areas of constitutional instruction and learning. American school teachers and the American electorate will benefit from further investigation and research. While this is true with many aspects of American public education, it seems especially true of constitutional instruction and learning--a recurring theme in curriculum guides across the United States. The Constitution forms the basis of civic education in America and is fundamental in fostering a full understanding of the American political system. Further, constitutional knowledge is a prerequisite of responsible citizenship. This goal was echoed as recently as 1990, when the nation's governors and President George Bush came together to formulate a policy statement for education (Education 2000). Goal three of the six goals identified by the governors and the President reads as follows:

> By the year 2000, Americans will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, history, and geography; and every school in America will ensure that all students learn to use their minds well, **so that they may be prepared for responsible citizenship**, further learning, and productive employment in our modern economy.

Again, citizenship education made it onto the list of essential educational goals. If citizenship education, and therefore constitutional education, is given high priority in an increasingly crowded social science curriculum, currently is far below expected goals and objectives, and is considered a staple in becoming a well-informed citizen, then further research and study are needed to overcome its deficiencies.

A basic starting point for any investigation is to find out what information is currently available to the researcher. In Chapter I of this thesis, a synthesis of the few studies, articles, and speeches produced on the topic of constitutional instruction or learning is provided. The studies, articles, and speeches are both qualitative and quantitative. They do provide the reader with a framework of problems in constitutional instruction and many offer possible solutions to those problems. Chapter I provides a synthesis of both perceived problems and potential solutions in teaching and learning about the United States Constitution. Many solutions are grounded in past or current educational research and the application of past or current research to constitutional instruction while other possible solutions are specific to the area of constitutional education.

Proceeding from this synthesis of information concerning constitutional instruction and learning, Chapter II traces, in historical, narrative form, a constitutionally significant Supreme Court case which occurred in Nebraska and relates to education and the First Amendment. The case, Westside Community Schools v. Mergens, was granted writ of certiorari by the Supreme Court in 1990 and contains both statutory and constitutional elements that make it a proper vehicle to convey constitutional principles and Supreme Court practices to secondary students. The history found in Chapter II draws on both primary and secondary sources as well as interviews with key persons involved in the case.

Because the case lends itself as an appropriate vehicle for conveying constitutional principles, is local in nature, and deals with a topic secondary school students can relate to (secondary schools), Chapter III focuses on possible ways to teach about the case consistent with the synthesis supplied in Chapter I. Chapter III is intended to aid teachers of constitutional history, law, and government in planning productive units and lessons for their students. Chapter III can be viewed as the culmination of the research and history conducted in Chapters I and II.

Identified Problems Associated with Teaching and Learning About the United States Constitution

The United States Constitution, written in 1787, represents the oldest written constitution in the world still in use. The constitutional ignorance which characterizes the American public in the 20th century will surely be one of the negative legacies associated with the American educational system in this century. The Constitution does not need to be venerated or memorized to be understood. Teaching or learning about the Constitution involves teaching or learning about ideas--ideas that form the basis of the American system of government. As mentioned in the Introduction, the American educational system is failing to adequately teach about those ideas. The first part of this chapter is intended to synthesize articles, speeches, qualitative and quantitative studies which focus on persistent problems in constitutional instruction and learning; while the last part of the chapter synthesizes articles, speeches, qualitative and quantitative studies which focus on ways to improve constitutional instruction and learning.

Curriculum

Perhaps the most logical starting point for a discussion of teaching or learning about the U.S. Constitution in American secondary schools would be the Constitution's place in the American secondary school curriculum. As the NAEP reported in 1988, "Across the grades, there appears to be a positive relationship between students' average civics proficiency and the amount and frequency of instruction they received in social studies, civics, or American government" (p. 75). In short, the more students studied about government or civics the better they became at identifying basic governmental structures and individual rights. High school students reported varying amounts of government or civics instruction (NAEP, 1988):

• "None"	7.9%
• "Less than 1/2 year"	4.8%
• "1/2 year"	14.3%
• "Between 1/2 and 1 year"	10.6%

• "1 year"	22.6%
• "More than 1 year"	39.9%

What's more, 43 states mandate instruction about the Constitution in secondary schools and it is a part of the required courses in American history or government in virtually all school districts in the United States (Patrick, 1987). Finally, when looking at curriculum guides of state-level departments of education and local school districts one finds ample lists of objectives and topics on constitutional history (Patrick, 1987).

Upon first glance, civics and the Constitution appear to be holding their own in an increasingly crowded social science curriculum. Both students and schools frequently report them as a part of their social science curriculum. What's more, the NAEP (1988) reports that students appear to be more proficient in civics the more time they spend studying civics. With these facts in mind, what could possibly account for the dismal performance of high school students and the American public on civics and constitutional topics?

For one thing, a closer examination of the secondary school curriculum shows that while civics and the Constitution have a secure and stable place in the curriculum, that is often not translated into lesson plans and class activities (Patrick, 1987). In the classroom, the teacher must decide which of the broad range of social science topics shall be taught and how much time will be devoted to each topic.

Often, civics and constitutional education are overwhelmed or obscured in the classroom by other topics such as multiculturalism, women's history, and environmental issues (Patrick, 1987). In many school districts across the United States, teaching or learning about the Constitution is simply viewed as less important than many other competing topics (Patrick, 1987).

Textbooks

Although the available literature identifies a variety of problems associated with constitutional education, no problems appeared as frequently as those associated with the constitutional coverage in the average American textbook (Hyland, 1985; Patrick, 1987, 1988b, 1991; Remy, 1987; Robinson, 1984; Turner, 1987a; Wasson, 1991). The authors of these articles and studies reveal many common deficiencies in constitutional coverage in the most widely used texts in secondary schools. From the outset of this analysis, it should be noted that many of these studies are dated and it is possible that some texts have improved their constitutional coverage. Still, it is safe to assume many poorly written texts are still used or, in newer texts, the identified problems have not yet been corrected.

Before examining the contents of the most widely used textbooks, an inquiry into teachers' reliance on the text, in teaching about the Constitution, may prove to be beneficial. Put another way, in a society where the meaning of the

Constitution changes frequently, why should teachers blindly teach from unclear, superficial, inconsistent, and inaccurate textbooks (Kammen, 1986)? Yet, this is by far the most common instructional approach used by teachers when conveying civic or constitutional information (NAEP, 1990). The instructional approaches were reported by students in government or civics classes at grades 8 and 12 (NAEP, 1990) (see Table 1). The two most frequently reported instructional approaches are directly related to textbooks and several of the others must certainly rely on textbooks at least in part.

Establishing that American secondary school teachers rely heavily on textbooks for civics and constitutional instruction does not necessarily identify a problem. Reliance on textbooks is only a problem inasmuch as the textbooks themselves are inadequate. The author of one report, Mary Jane Turner (1987b), analyzed quantitative studies that examined constitutional coverage in the most widely used American history texts. Taken together, these textbook studies revealed the following common deficiencies (Turner, 1987b):

- shallow treatment of basic constitutional principles,
- lack of historical continuity in treating issues,
- inadequate attention to or description of Supreme Court decisions [e.g., five major Supreme Court decisions that tended to be left out: Charles River Bridge v. Warren Bridge (1837), Ex Parte Milligan (1866), Muller

Table 1. Instructional approaches reported by students in civics classes in grades 8 and 12.

	Percentage of students		
	Daily or weekly	Monthly	Yearly or never
• Read material from the textbook			
Grade 8	90.0	5.4	4.7
Grade 12	86.8	7.7	5.6
• Discuss and analyze the material you have read			
Grade 8	83.3	8.3	8.4
Grade 12	84.2	9.5	6.2
• Discuss current events			
Grade 8	67.5	18.0	14.6
Grade 12	80.0	12.2	7.8
• Read material not in your textbook			
Grade 8	37.7	28.0	34.3
Grade 12	44.5	26.8	28.7
• Take a test or a quiz			
Grade 8	69.1	27.3	3.5
Grade 12	77.8	19.9	2.3
• Write short answers to questions			
Grade 8	70.8	17.6	11.6
Grade 12	68.4	20.0	11.7
• Give talks about what you are studying			
Grade 8	62.4	13.0	24.6
Grade 12	51.3	14.7	34.0
• Memorize the material you have read			
Grade 8	45.7	20.8	33.5
Grade 12	44.7	21.9	33.4
• Read material not in your textbook			
Grade 8	37.7	28.0	34.3
Grade 12	44.5	26.8	28.7
• Work on a group project			
Grade 8	13.4	26.9	59.7
Grade 12	17.3	31.0	51.8
• Write a report of three or more pages			
Grade 8	9.8	28.3	61.9
Grade 12	12.0	31.0	57.0

From The civics report card by National Assessment of Educational Progress, 1990, Princeton, NJ: Educational Testing Service.

v. Oregon (1908), Near v. Minnesota (1931), and Roe v. Wade (1973)],

- lack of attention to the political dynamics associated with the processes of constitutional choice,
- discrete treatment of the history of the Constitution (i.e., fragmented so basic themes--representative democracy--could not be fully developed), and
- insufficient attention to connections between constitutionally relevant issues and events.

Although all the textbooks reviewed included a copy of the Constitution, less than 12% of the content pertained directly to the Constitution--its origins, development, and content (Turner, 1987b). Similarly, a review of government textbooks' attention to constitutional principles proved to be little better--12 to 23% (Turner, 1987b).

Not only is constitutional treatment limited and shallow, the writing itself was extremely bland (Patrick, 1987). The controversy and drama associated with the origins or principles of the Constitution are absent from most of the textbooks (Patrick, 1987). Textbooks serve the undistinguished function of transforming an inherently powerful and exciting subject into unimaginative blandness. It seems as though this problem could be easily overcome by telling the whole story instead of its most boring parts.

The authors of the aforementioned studies seem to agree that textbooks should not be the only instructional technique to convey constitutional knowledge. The best textbooks can aid in vocabulary development, transmission of factual information, and placing the Constitution in a historical context (Robinson, 1984). Still, textbooks should be used as a part of a larger group of resources that includes many types of supplementary materials (Robinson, 1984).

Teacher Preparation

The absence of constitutional knowledge which characterizes American students and the American public raises questions beyond the curriculum or textbooks--questions about what teachers know about the Constitution and what they believe about teaching (Hyland, 1985). John Hyland's qualitative study of a large, metropolitan junior high school in the western United States attempted to construct an accurate description of how teachers taught about the Constitution. Hyland's findings, concentrating on teacher behaviors, may prove to be valuable in identifying another problem area in constitutional education.

In terms of substantive knowledge of the Constitution, teachers did demonstrate familiarity with general principles of the Constitution--rule of law and separation of powers (Hyland, 1985). Beyond this limited understanding of basic constitutional principles, teachers showed a limited understanding of the Constitution (Hyland, 1985):

- They described the Constitution in elementary terms and seldom supplied illustrations of issues, dates, articles, or clauses beyond those found in the eighth grade textbook.

- They could not provide adequate explanations of why the Constitution was written.
- They could not provide examples of basic constitutional principles.
- Out of 10 historians prominent in the field of constitutional history, they could identify only one--Charles Beard (whose economic interpretation of the Constitution is highly questionable today).

Hyland observed teacher planning for constitutional instruction to be consistent with other research on teacher planning. Generally, teachers were concerned with the selection of content which was simple (so their students could "handle it"), with time (so they could "cover" what they wanted to), and with short-term, day-to-day considerations (Hyland, 1985). What teachers failed to plan for were the nature of the subject matter, the meaning of the Constitution, adolescent learning theory, or any kind of interdisciplinary approach to teaching the Constitution (Hyland, 1985). When teachers selected content, it was narrow in scope, lacked depth of treatment, and did not involve students in rational analysis and decision making appropriate for participation in a democratic society (Hyland, 1985). Lastly, little or no attention was provided by teachers in the planning process, or beyond, that focused on critical thinking (Hyland, 1985).

Also, teachers of the Constitution talked a lot about democracy and participation, but not one teacher in Hyland's study modeled this behavior for their students in their classroom (Hyland, 1985). They viewed the teacher as central in keeping order in the class: ". . . I impose the discipline on the class. . . ," "the rules of the class are my rules" (Hyland, 1985). While the teachers talked about democracy, they modeled authoritarianism.

Methodology

Much of what has been written about the teaching methods of constitutional educators seems to be applying new knowledge to old practices. To this extent, constitutional education is advancing as education generally advances, and that is too fast for many teachers. The same can be said for almost every discipline in education. Again, this synthesis of problems in constitutional instruction will be followed by a synthesis of possible ways to improve constitutional instruction.

Rote memorization. In terms of actual teaching methods, one method has historically dominated constitutional instruction--rote memorization (Wasson, 1991; Wease, 1986). Beginning in the very early decades after the Constitution was ratified, students were expected to memorize the text of the entire document (Butts, 1981). The scene is unfortunately commonplace in American schools today as well. Memorization still ranked in the top 10 instructional approaches used by teachers in civics classes (NAEP, 1988). Teachers believe that by requiring students to memorize the Preamble, they are creating a well-informed citizen. The problem with rote memorization is that it merely scratches the surface of a full understanding of the Constitution (Wasson, 1991). Understanding the Constitution involves much more than being able to recite it. Memorization is not a prerequisite to a deeper understanding of the Constitution.

Reliance on history. At least one researcher contends that until teachers shift their priority from teaching the Constitution through historical examples to teaching about it in action, students will never gain a true and full appreciation of the Constitution (Smith, 1988). This does not mean students should not place constitutional principles in historical context. Students should consider the events of today (e.g., Iran-Contra, Desert Storm, 1992 Presidential Election) and attempt to put them into a constitutional context that is relevant today. The meaning of the Constitution changes and students should recognize those changes. The study of the Constitution seems boring because students cannot see how it fits into their lives today (Smith, 1988). Teachers should examine current state and federal law in constitutional terms. For example, when examining a current state or federal law, the teacher should begin by identifying the constitutional authority of either in passing the law in the first place (police power, commerce power, etc.).

Also, teachers (and the average textbook) tend to only concentrate on the "good things" which are connected with constitutional history and ignore its more interesting and undemocratic features (Patrick, 1987; Smith, 1988). These might include:

- slavery being recognized as a valid institution,
- voting limited to white males over 21 with property, and
- some of the more controversial Supreme Court decisions (e.g., Dred Scott v. Sandford, Plessy v. Ferguson).

Indeed, teachers of constitutional history are blessed with a wealth of material (current and historical) to spice up instruction and learning (Patrick, 1987).

One-sided interpretations. Besides exposing students to the Constitution's undemocratic features, students should also be exposed to the vagueness and ambiguity that was written into the Constitution (Bauer, 1991). Unfortunately, many teachers today are exposing students to one-sided textbook interpretations of the Constitution's great clauses (Bauer, 1991). Students should be taught sufficient background information to make reasoned decisions about some of the Constitution's ambiguity. This background would surely include primary works (e.g., Madison's Notes and The Federalist Papers) and secondary works (e.g., newspapers and pamphlets) so students could gain an appreciation for the conflicting thinking of the founders and of the day (Bauer, 1991). Obviously, some general historical background beyond primary and secondary sources would be necessary as well--preparing the stage for many decisions that came to shape American government today. With the proper background information, secondary students could enter the enduring debate over any of the Constitution's many-sided interpretations (Bauer, 1991).

Classroom environment. The appropriate classroom environment is the focus of many studies in the area of constitutional education. The organization of the classroom can be a vehicle to model democratic and constitutional values (Hyland, 1985; McEwan, 1990; McPhie, 1988; Meyer, 1990). Contrary to this research, many social science classrooms are not set up this way (Hyland, 1985). The rules were observed to flow one way--from the teacher to the learner--and could only be described as autocratic (Hyland, 1985). In this setting, the learner can easily see the dichotomy between the teacher's actions and the teacher's words.

According to one author, the appropriate classroom environment for teaching constitutional and democratic values must include three basic ingredients (Meyer, 1990):

- a positive self-worth,
- an atmosphere of trust, and
- an atmosphere of respect.

With these basic elements in place, the classroom becomes a forum for discussion and debate of complex constitutional issues--Substantive Due Process, Procedural Due Process, and Equal Protection (McEwan, 1990). Moreover, in a democratic classroom environment students should be taught how their voices can be heard today--in the school (McPhie, 1988). Civic participation, whether in the school or in the community, seems to increase students' average civics proficiency (NAEP, 1988). The frequency of student involvement in civic activities showed a direct relationship on students' civic proficiency (NAEP, 1988). In the school or in the community, active involvement and participation can be accomplished in a variety of ways (McPhie, 1988):

- Set up mock elections or trials in the classroom that portray constitutional issues.
- Encourage students to talk with and lobby student representatives for initiatives they're interested in (representative democracy).
- Encourage students to go directly to school board meeting to voice their opinions on proposed policy measures (virtual democracy).

Essentially, teachers should strive to create a model, in the classroom, representative of the ideals which they are attempting to teach; this would include active participation by the students as "student citizens" as well as citizens of their city, state, and the national government.

Possibilities for Improvement in Constitutional Education

Without a doubt, research in constitutional education shows a strong need to enhance and improve constitutional instruction and education. Many answers to problems posed in the first half of this chapter are self-evident. For example, although the Constitution and civic education continue to be curriculum goals of state departments of education and local school boards, teachers must put these goals into action in the classroom. To this extent, this part of Chapter I focuses less on direct answers to those problems and more on possibilities for improvement that may take several identified problems into consideration at once.

Many of the ideas that follow are the result of heightened constitutional awareness which came about at the time of the Bicentennial of the Constitution and the Bill of Rights. Additionally, this awareness was furthered by various studies (i.e., NAEP, 1988; Hearst Report, 1987) that identified the constitutional ignorance of both students and the American public. While many ideas described in the following pages are not new, they remain to be implemented in many secondary classrooms across the country. Some can be considered general educational principles applied to the Constitution while others are specifically tailored to meet the demands of teaching about the Constitution in secondary schools.

Primary Sources

Admittedly, taking what many students consider a "boring" subject and pumping it full of life is no easy task. Many researchers point out that teachers are ignoring an important and readily available resource--primary documents (Bauer, 1991; Mueller & Schamel, 1988; Patrick, 1988a). Original works may include:

- The Federalist and Anti-Federalist writings,
- the Declaration of Independence,
- the Articles of Confederation,
- Madison's notes on the Convention,
- the United States Constitution, and
- the majority and dissenting opinions of landmark Supreme Court cases.

These original works [many available from the Education Branch (NEEE), National Archives, Washington, DC 20408] make history more "real" and stimulating for both teacher and learner (Mueller & Schamel, 1988). Students are more likely to achieve greater levels of cognition about the Constitution if they are taught to derive and use evidence in primary documents to answer questions and participate in classroom discussions (Patrick, 1991).

Examination of primary sources encourages the critical reading and thinking that take students beyond the surface understanding to a more complete understanding (Patrick, 1988a). Exposure to primary documents enables the student to interpret their implicit meanings--rather than being force-fed one interpretation or another (Bauer, 1991). By giving students the opportunity to analyze primary documents, teachers display a confidence in students' abilities as young scholars. Again, primary sources are best utilized when students are provided with the necessary historical background to foster critical and analytical reading. Simply using primary documents will not automatically raise student understanding of the Constitution--they must be used by teachers who can provide the appropriate background information. When this happens, students participate directly in historical inquiry (Patrick, 1991).

Comparative and Global Perspectives

While it is true the United States has the oldest written constitution still in use, it does not have the only one. Many leading scholars indicate constitutional instruction should revolve around comparative study of other constitutions and governments (Patrick, 1987, 1988c; Ravitch, 1991; Reggio, 1990). The U.S. Constitution has served as a model for many other constitutions around the world (Patrick, 1988c). However, the United States government is among a small minority of governments in the world that is a constitutional government (Patrick, 1988c). For example, while many constitutions guarantee freedom of speech, few guarantee freedom after speech (Patrick, 1988c).

A deeper understanding of the Constitution results from comparing the Constitution to other documents (Ravitch, 1991). These documents might include:

- The English Magna Carta and common law principles,
- the enlightenment writings,
- Haiti Constitution,
- Iroquois documents,
- writings at the time of the American and French Revolutions,
- the United States Constitution,
- the Universal Declaration of Human Rights, and
- other constitutions throughout the world.

One scholar provided a particularly interesting lesson plan entitled, "The Model Constitution" (Reggio, 1990). In the lesson, students are asked to analyze a "model constitution" and compare it to the United States Constitution. Students will then identify differences and similarities of the two constitutions and vote on which one they prefer. (They will usually vote overwhelmingly in favor of the "model constitution.") The teacher will then make students aware that the "model constitution" is really the Constitution of the U.S.S.R. as adopted in 1977. The lesson is beneficial in a variety of ways--especially in manifesting the difference between a government that has a constitution (U.S.S.R.) and a constitutional government (United States) (Patrick, 1988c).

Community Resources

Closer to home, many educators have signed off on the idea of helping students understand the Constitution by forging partnerships between schools and communities (Gallagher & Robinson, 1989; Repa, 1990). Some of the more obvious community resources are local lawyers, judges, and politicians--who could expand students' knowledge of "the Constitution in action" (Repa, 1990). For example, having a judge describe what the Due Process Clause or Equal Protection Clauses mean in 1993. Of course, students must be adequately prepared to use these types of resources--given the necessary background information. Lawyers, judges, and politicians could provide students with a new constitutional perspective that is not found in the textbook. The biggest challenge seems to be finding the right person in the community to "connect" with the students.

Another remarkable suggestion would use one of the most plentiful resources in every community to pass along constitutional knowledge--senior citizens (Gallagher & Robinson, 1989). Strategies for using senior citizens are largely limited to the imagination of the teacher and the students. Even so, adherence to a few basic principles improves the success rate (Gallagher & Robinson, 1989):

- adequate preparation and use of outside resources,
- provide for a sufficient quantity of instruction,
- balanced selection and presentation of case materials,

- proper use of interactive teaching strategies,
- involvement of building administrators, and
- development of professional peer support for teachers.

The key development in using these valuable resources is contained in coming up with a list of topics which blend constitutional and community relevance; in other words, finding constitutional topics which have had some impact on the seniors' life (Gallagher & Robinson, 1989). For example, seniors could be questioned about prohibition (18th Amendment), women's suffrage (19th Amendment), separate but equal doctrine (Plessy v. Ferguson), or desegregation (Brown v. Board of Education). Seniors, having lived through many major constitutional changes, can add still another perspective for which students can consider (Gallagher & Robinson, 1984). Obviously, having someone share their constitutional heritage (through life experience) benefits not only the student, but the senior citizen as well.

Case Studies

Although community resources are helpful in bringing the Constitution closer to home, the use of case studies provides students with excellent examples of the "living Constitution" (Patrick, 1987, 1991; Gold, 1990). By emphasizing landmark Supreme Court cases, teachers can show how the meaning of the Constitution changes frequently and sometimes departs from the original understanding (Patrick, 1987). Three basic steps are important when using case studies (Patrick, 1991):

- Review background information to set a context for analysis.
- State and clarify the issue in the case.
- Examine and appraise responses.

Following these steps, students' minds can be filled with current constitutional information while stimulating debate and analysis on a wide variety of constitutional issues (Patrick, 1987).

Case studies are important tools in conveying constitutional information because ultimately judges decide what the Constitution means. The case study method of teaching has been used successfully in various social science curriculum projects from the 1960s through the 1980s (Patrick, 1991). A variety of law-related education projects have stressed the importance of case studies in the classroom and documented their effectiveness in the classroom (Patrick, 1991). The drama that is missing from many textbooks can be found in almost any constitutional case study. Students need to be exposed to a variety of cases to begin to understand how judges read the Constitution, and how frequently they disagree about the meaning of the Constitution. Case studies should not be limited to landmark Supreme Court cases, but should also include current cases as well (Patrick, 1991). Case studies also illustrate how the Court has changed over time in ruling on various constitutional issues.

One sample lesson plan provided an appropriate modern case study--Cruzan v. Missouri (Gold, 1990). The issue at hand (euthanasia) and the facts of the case are provided to the students. The students' job then is to "fit" the case and the issue into a constitutional framework (arguing either side). Students could work individually or in a cooperative setting as they attempt to analyze the case and its various issues. Having the students perform a mock trial could culminate debate and analysis of the issue. Mock trials or elections have been shown to have a positive effect on students' average civics proficiency (NAEP, 1988). After the trial, the teacher explains the actual ruling thereby showing how the Supreme Court "fit" euthanasia into a constitutional framework (Gold, 1990). The teacher could also point out the merits of dissenting opinions and the different ways in which judges read the Constitution.

Technology

Almost every discipline in education is using available technology with more frequency and vigor. In school districts everywhere, computers, CD roms, video laser discs, and satellite communications are changing the structure of classrooms, student learning, and information that is available to students (Glenn, 1990). The social science classroom of tomorrow will be vastly different from the one that exists today as a result of advancing technology (Glenn, 1990).

The use of technology in constitutional education may be especially valuable as society advances into the technological age (Glenn, 1990). In a technological age, citizens of a democracy need to be armed with the knowledge and skills appropriate for the time (Glenn, 1990). According to one author, Allen D. Glenn (1990), citizens in a democracy must be able to:

- Understand the role of information in a democratic society and the issues related to the balance between the ideals of freedom and the privacy and need for information.
- Comprehend how data are collected, stored, analyzed, and used in policy-making decisions.
- Gain the technological skills needed to access and manipulate information on various technology systems--computers, video laser discs, networks, and CD roms.
- Assess the quality of the information being presented to them, whether it be in digital or visual databases or presented visually via electronic devices.
- Develop analytical skills needed to develop descriptive and explanatory generalizations drawing upon a varied database.
- Explore topics related to technology to gain an understanding of how technology is affecting social, political, and economic issues.

- Work cooperatively with others in examining data, developing possible solutions, and making decisions.
- Believe they have the ability to access the information they need to make decisions.

Over 40 years ago, Hubert Evans and Ryland Crary (1952) wrote in the _Twenty-second Yearbook of the National Council for the Social Studies_, "A free society is free because its citizens, past and present, have made it free; it will remain free only as long as its citizens keep it free" (p. 217). The challenge for citizens today is related to understanding and using the technology which is available to them (Glenn, 1990).

Just as learning and understanding technology will aid citizens in the advancing technological age of tomorrow, so will technology aid in the social science classroom of today. A variety of software has been developed to allow students to discover various constitutional principles. An example of the software available to teachers of the Constitution is Targeted Learning Corporation's "The U.S. Constitution Then and Now." The software consists of two independent units, both of which require AppleWorks software to operate (White, 1988). The first unit simulates the Constitutional Convention, placing the students in the role of delegate to the Constitutional Convention (White, 1988). In the first unit students debate the central plans and issues of the Convention (White, 1988). The second unit concentrates on two case studies which allow the students to analyze aspects of the Bill of Rights (White, 1988).

The use of computer software as an instructional approach in constitutional education is clearly not for everyone (White, 1988). Obviously, computer software is feasible only when students have reasonable access to computers. Also, students and teachers who are familiar with computers and technology will benefit most from the software which is available (White, 1988). The software available in constitutional education requires basic skills in operating a computer. But for those students and teachers who are familiar with computers and have access to them, there are a variety of programs available to bring the Constitution into the technological age (White, 1988).

Cooperative Learning

The teaching strategy of cooperative learning is not a novel idea in education. One of the most thoroughly researched areas in education, studies have consistently shown the benefits of cooperative learning in classrooms across the United States (Lyman & Foyle, 1988). It is a strategy in which students actively participate in their learning with other students and is relatively easy to implement (Lyman & Foyle, 1988). Groups work together to decide what information is important, how the information will be organized, and how the information will be presented. These skills call for the higher levels cognition of application, inference, and synthesis (Lyman & Foyle, 1988). Two researchers, Lawrence Lyman and Harvey Foyle (1988), have compiled a list of 10 steps to be considered when using cooperative learning strategies:

> - The content to be taught is identified and criteria for mastery is determined by the teacher.
> - The cooperative learning technique that would be most useful to the specific objective is identified and the group size is determined by the teacher.
> - Students are assigned to groups. Heterogeneous learning groups have the most potential for success in cooperative learning as student differences make the groups work.
> - The classroom is arranged to facilitate group interaction.
> - Group processes are taught or reviewed as needed to assure that the groups run smoothly.
> - The teacher makes the expectations for the learning clear and makes sure students understand the purpose of the learning that will take place in groups.
> - The teacher presents initial material as appropriate using whatever technique they choose.
> - The teacher monitors interaction in the groups as students work on their tasks and provides assistance and clarification as needed.
> - Student outcomes are evaluated. Students must individually demonstrate their mastery of important skills or concepts of learning. The students may be asked to think of creative or unusual ways to demonstrate what they have learned.
> - Groups are rewarded for their success. Teacher verbal praise, class newsletter, or bulletin board recognition are possible ways to reward high achieving groups. (p. 3)

Cooperative learning is also a strategy which, when used properly, can compliment constitutional instruction (Lyman & Foyle, 1988). Lyman and Foyle (1988) provide a sample cooperative lesson, "The United States Constitution: Powers of Congress," which utilizes cooperative learning strategies. In the lesson, students are assigned to heterogeneous groups and each student is assigned a different task. After the learners have been supplied the necessary background information, the groups are asked to respond to the following questions (Lyman & Foyle, 1988):

- According to Jefferson, why did the Constitution not give Congress the power to set up a national bank?
- According to Hamilton, what justification was there for a broad interpretation of the Constitution?
- If strict constructionism had won out, how would the United States be different today?

By working in groups, students can teach each other constitutional concepts and achieve higher levels of cognition simultaneously.

Concept Mapping

Throughout the history of teaching about the Constitution in the United States, teachers have struggled with organizing the complexities of the document (Wease, 1986). Organizational strategies run the gamut from a straight chronological approach to organizing around the philosophical make-up of different Supreme Courts. One way to organize the content of the Constitution is by focusing on major concepts and ideas (Wease, 1986). Constitutional educators are challenged to mesh the sometimes conflicting values of equality, liberty, security, justice, and the general welfare into constitutional principles such as separation of powers, checks and balances, judicial review, and federalism. Using any instructional design, these are difficult concepts to convey to secondary students.

The technique of concept mapping, used in a variety of educational disciplines, allows the learner to visually represent many different and conflicting ideas at the same time (Wease, 1986). According to John Novak and Bob Gowin (1984), a concept map is a ". . . schematic device for representing a set of concept meanings embedded in a framework of propositions" (p. 15). Relationships are mapped out among various concepts through linking lines and words (Wease, 1986). The linking lines of a concept map chart directions relationships (Wease, 1986). Items that contain similar characteristics are often grouped into the same concept which is assigned a more general name. Concept maps also show hierarchial relationships as subordinate, smaller concepts are placed below superordinate, larger concepts (Wease, 1986).

There is no one correct way to concept map (Wease, 1986). Concept mapping is an individual process which, again, depends on students being prepared with enough information to chart relationships in an acceptable manner. By asking students to grapple with constitutional information in the formation of a concept map, teachers force students to externalize implicit concepts and propositions in the Constitution (Wease, 1986). This is the type of learning, according to John Dewey (cited in Wease, 1986) that is the "offspring of doing," which "results in knowledge and fruitful understanding" (p. 7). One example of a possible constitutional concept map is provided in Figure 1 (Wease, 1986).

Summary

Clearly, there is not a single correct way to teach about the United States Constitution in secondary schools. An educator must take several variables into consideration when calculating the proper formula. Educators must consider everything from the age and educational background of the students to the identified goals of their social science curriculum. However, this is not to say research in this area is without value. Educational researchers have highlighted both positives and negatives in constitutional instruction. So those who teach about the Constitution may educate themselves--not only about what to avoid, but also about possible strategies that may be more effective in the future.

Teaching and learning about the Constitution in secondary schools across the United States is as old as the Constitution itself (Wease, 1986). Constitutional and citizenship education underwent many changes over the last 200 years, but problems still exist that must be corrected. While the Constitution is a part of the written curriculum in most states and school districts across the country, those curriculum objectives need to be addressed in the classroom by competent teachers who are adequately prepared to teach about the document (Patrick, 1987; Hyland, 1985). The most widely used American history texts need to expand their

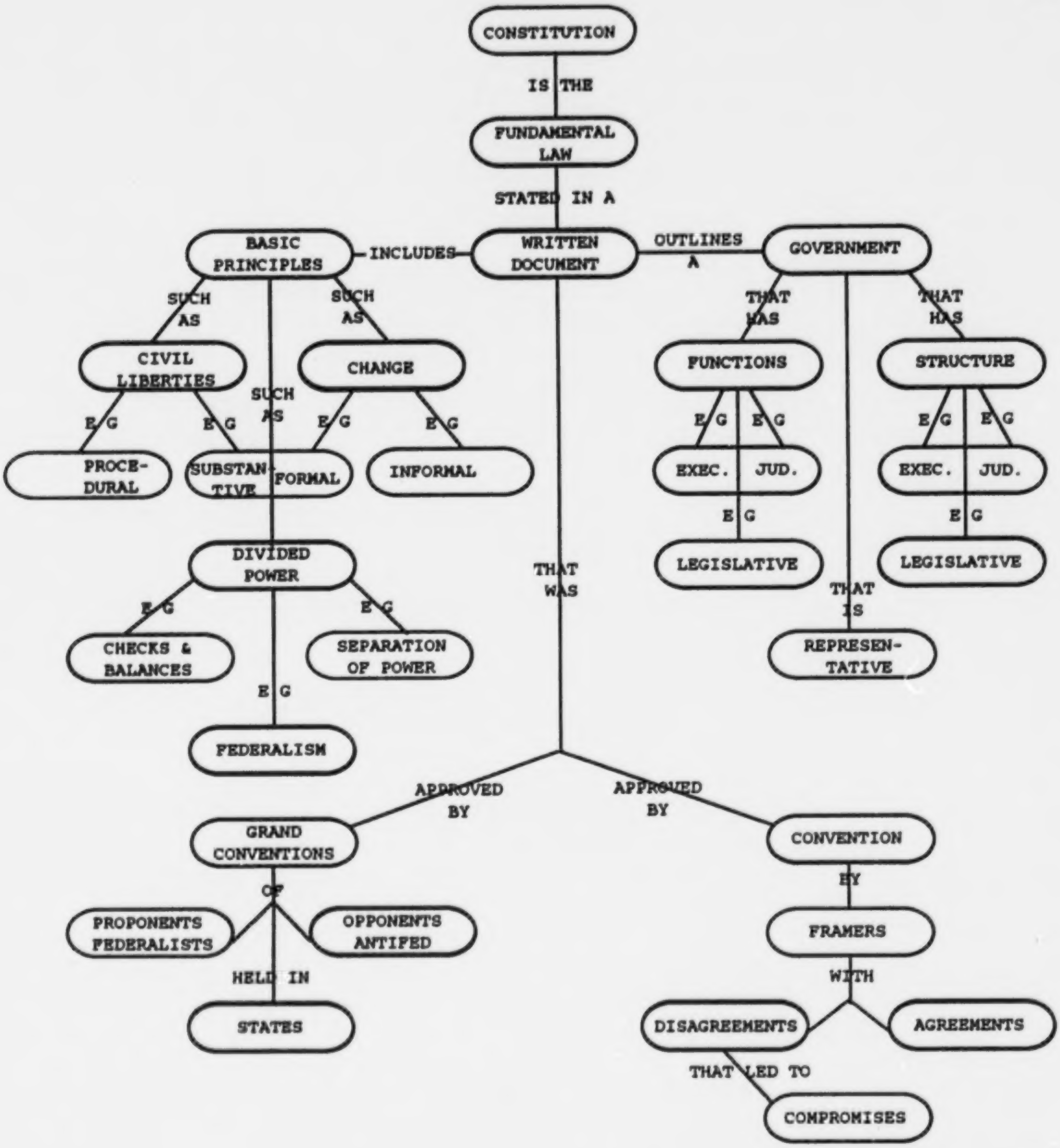
CONSTITUTION
IS THE
FUNDAMENTAL LAW
STATED IN A
WRITTEN DOCUMENT
INCLUDES
BASIC PRINCIPLES
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Figure 1. Concept map of the United States Constitution. Note. From Teaching about the United States Constitution in the bicentennial period (p. 8) [Machine-readable data file] by H. Wease, 1986, Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Sciences Education (Producer and Distributor).

constitutional coverage and begin conveying constitutional themes with the spice and flavor they deserve (Patrick, 1987; Remy, 1987; Turner, 1987b). Finally, teachers need to rely less on poorly written textbooks and rote memorization, and more on the latest innovations in education and modeling the democratic ideals they aim to teach in their classrooms (Hyland, 1985; Patrick, 1987; Smith, 1988).

Not only have articles and studies been written about the failings of constitutional education, many have also been written about possibilities for future improvements. Many different teaching or learning strategies can be applied in constitutional education. Some are more specific to the Constitution while others are sound educational principles in almost any discipline. Teachers of the Constitution have successfully used primary sources, community resources, comparative and global perspectives, and cooperative learning strategies in conveying constitutional concepts (Gallagher & Robinson, 1989; Gold, 1990; Lyman & Foyle, 1988; Mueller & Schamel, 1988; Patrick, 1988c; Ravitch, 1991). As society advances in the technological age, responsible citizens must be armed with the skills to access and manipulate information (Glenn, 1990; White, 1988). Students and teachers who are familiar with computers and have access to them may use a variety of software that is available and written specifically about the Constitution (White, 1988). Lastly, requiring students to make visual representations of complex constitutional themes through concept mapping allows students to achieve higher levels of understanding and cognition (Wease, 1986).

CHAPTER II

USING SUPREME COURT CASES TO CONVEY CONSTITUTIONAL PRINCIPLES: COMMUNITY OF WESTSIDE SCHOOLS V. MERGENS

While no single "correct" way exists to teach about the Constitution, the use of case studies continues to be a proven instructional approach in social studies classrooms across the United States (Patrick, 1991). Ultimately, what the Constitution "means" is decided by the Supreme Court as important constitutional issues make their way to the Court. Teachers who are equipped with sufficient constitutional knowledge to set an appropriate background for a particular case will be most successful in using this instructional approach (Patrick, 1991). Background information on any issue must include the history of the clause or amendment at issue and the history of how the Supreme Court has dealt with that issue through the years. In secondary classrooms it is not possible or practical to study every issue the Supreme Court confronts every year. The teacher, as facilitator, must choose from that myriad a few cases that represent the Constitution and how the Supreme Court operates. Concentration on a few well-chosen cases will give students a sufficient "feel" for how the Court and Constitution operate.

Students exposed to in-depth analysis of constitutional issues through case studies will be engaging in processes that foster critical reading and thinking. One author, Barry K.

Beyer, attempted to form a definition of critical thinking based on the writings of specialists in that area. According to Beyer, most specialists agree that critical thinking is (1985): ". . . the assessing of the authenticity, accuracy and/or worth of knowledge[,] claims, and arguments." This definition is nearly identical to the various processes students should engage in while studying significant Supreme Court cases. The case study approach forces students to examine the authenticity, accuracy, and worth of claims and arguments on both sides of a constitutionally relevant issue. According to Beyer (1985), the "core" of these processes seem to be:

- distinguishing between verifiable facts and value claims,
- determining the reliability of a source,
- determining the factual accuracy of a statement,
- determining relevant from irrelevant information, claims, or reasons,
- detecting bias,
- identifying unstated assumptions,
- identifying ambiguous or equivocal claims or arguments,
- recognizing logical inconsistencies or fallacies in a line of reasoning,
- distinguishing between warranted and unwarranted claims, and
- determining the strength of an argument.

It cannot be denied that these are the very skills which students must use, in various degrees and combinations, to analyze and evaluate constitutional cases.

Judging an argument's validity is arguably the most common critical thinking skill associated with case studies. The procedures used by students engaged in this skill require that they use other critical thinking skills (Scriven, 1975):

- clarify the meaning of all major words,
- identify the stated and implied conclusion,
- identify the structure of the argument,
- identify any unstated assumptions,
- identify and critique any premises and inferences,
- seek other relevant arguments, and
- evaluate the quality of the argument in light of the results of the preceding steps.

The teacher must be able to model and encourage these processes when students are asked to judge an argument's validity. Presumably, this would be the most common critical thinking skill that relates to case studies.

Few teachers would argue with the worth of teaching critical thinking skills in social science classrooms; however, some may argue over the appropriateness of some topics. The issues presented in many Supreme Court cases are controversial and raise emotion on both sides. Teachers in a pluralist democracy should encourage, not neglect, controversial topics (Kelly, 1989). It is hard to imagine how teachers could adequately convey complex constitutional principles without touching on some controversial subjects in the process. When leading controversial discussions, teachers must be aware of important strategies that will aid in insuring discussion that is sustained, thoughtful, and coherent (Kelly, 1989):

- asking clear, focused questions,
- waiting for responses,
- calling on nonvolunteers as well as volunteers,
- promoting student-to-student interaction,
- probing for clarity, definition, and elaboration, and
- checking to see if one discussant understands another one correctly.

The goal of teaching controversial issues should be to enhance the civic competence of students--so that they can rationally discuss complex issues as citizens in a democratic society (Kelly, 1989).

The use of case studies does not guarantee critical thinking, rational discussion, or success in the classroom. Like any instructional approach, case studies call for a competent teacher to provide students with background information that is necessary to analyze a case and the issues that it presents. Some historians and legal scholars argue that this requires students being exposed to the available history of the clause(s) at question in a particular case as well as the history of the statute(s) or governmental action. Other historians and scholars might argue that the original understanding of a constitutional clause is less important than how the clause "fits" into society today. This would, largely, depend on how students themselves decide to read the Constitution--from an originalist perspective or some other reading. To the extent that a student should make the decision for themselves, some history of the constitutional clause, or state or federal statute, is necessary. Many Supreme Court cases contain both constitutional and statutory elements that should be considered by teachers prior to their instruction.

Students not only need to be informed of statutory or constitutional history which is peculiar to a case; they also need to examine the history of how the Court has traditionally treated whatever issue is presented by a case. For example, if a teacher chose an Establishment Clause case, then students should be exposed to the history of how the Court has traditionally viewed the Establishment Clause. Well-informed teachers should show students that while the words of the Establishment Clause remain the same, the meaning of the Establishment Clause has changed as the members of the Supreme Court and society change. Then students can begin to apply that information to new sets of facts, achieve higher levels of cognition, and make reasoned decisions.

The Supreme Court hears over 100 cases every year involving a variety of issues--so teachers have many cases and issues to choose from. Among these choices, it only makes sense for teachers to choose cases which their students can relate to--issues that may effect them directly. An example of a possible case study which deals with issues directly related to secondary students is the Supreme Court case of Westside Community Schools v. Mergens (1990). That case contains both statutory and constitutional elements that deal directly with students. The statutory element in Mergens, the Equal Access Act, is an example of how Congress attempted to codify an earlier Supreme Court decision--Widmar v. Vincent (1981). The Equal Access Act is also an example of how the Federal Congress, using its power to tax, writes law which pertains to education and public school students. The Equal Access Act's constitutionality was tested in Mergens--an Establishment Clause case. In short, the Supreme Court case of Westside Community Schools v. Mergens (1990) is an appropriate vehicle to convey current constitutional and statutory principles to secondary students.

The Mergens case involves a recent piece of federal legislation, the Equal Access Act (1984), that pertains directly to secondary school students. The Equal Access Act, among other things, provides for:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of speech at such meetings.

Congress, using their power to tax, wrote a law which pertains directly to secondary students. Students may be surprised to know that there is a Federal law written specifically about student access to their school. That is, assuming the Equal Access Act has been triggered in their school--that their school receives Federal assistance and maintains a "limited open forum." According to the Supreme Court's ruling in Mergens, the vast majority of school districts would trigger the Act making the Mergens case controlling.

Since the Equal Access Act applies to most school districts, teachers may want to spend some time (or allow their students some time) looking at the constitutional basis of authority Congress used in passing the Act. Depending on time considerations and other variables, teachers may want to discuss how various powers of Congress have been defined broadly enough by the Supreme Court to allow Congress to legislate in areas the Constitution is silent. For example, passing the Equal Access Act, Congress relied on their broad power to tax to legislate about access to educational facilities. Teachers may want to expose their students to other areas of the Constitution which have been defined broadly enough by the Supreme Court to include education (e.g., Commerce Clause or Section V of the Fourteenth Amendment).

The Mergens case tested the constitutionality of the Equal Access Act--which brings up new issues that would be of value to secondary students. The question put squarely before the Court in Mergens was this: Was the Equal Access Act a violation of the Establishment Clause and therefore, unconstitutional? Again, students may be surprised to learn that a clause in the Constitution pertains directly to them as public school students and has its own judicial history. Background to Mergens might very well include a history of the Establishment Clause including a history of how the Supreme Court has treated the Clause with respect to public schools. Secondary school students could relate to Supreme Court cases which deal with other secondary students and their schools--even if they are students from a different state or generation.

This chapter, Chapter II, is intended to provide a history of the Mergens case and the elements and issues that it presents. Certainly, any teacher who chose this case as a way to convey various constitutional principles would want to spend some time setting the background for the case and the Court's decision. The history of the case is presented in narrative form and attempts to bring out issues that would be of value to teachers who chose to include the case in their classes. The history relies on primary and secondary sources and interviews with the students, school officials, and attorneys who were involved in the case. Primary sources include the legislative history of the Equal Access Act, court records as the case progressed through the federal court system, amicus curiae briefs presented on behalf of both sides, and the record of oral arguments made before the Supreme Court.

The Westside Story

The Inception of an Idea and Initial Reactions

In September of 1984, Bridget Mergens was beginning her senior year at Westside High School--a public secondary school in Omaha, Nebraska. After attending a Christian rock concert in Omaha that September, Mergens was surprised to notice how many young people were interested in Christianity and in attendance at a Christian rock concert (B. Mergens, personal communication, March 8, 1993). After the concert, Mergens thought,

> Wow, wouldn't it be neat to get together [with other Christian students] . . . I'm sure there is more than just two Christian students at Westside and it would be neat to kind of get everybody together . . . And we could all meet each other and get to know each other . . . I can remember saying wouldn't it be neat to if we could have a group at our school of all the [Christian] kids that are our age. (B. Mergens, personal communication, March 8, 1993)

After the concert and a discussion with one of her friends, Mergens abandoned the idea without trying to gain access to school facilities during the first semester.

Sometime shortly after Christmas of 1984, Mergens and other interested students began, once again, thinking of starting a Christian club at Westside High School (B. Mergens, personal communication, March 8, 1993). Mergens approached Westside Principal James Findley, who also happened to be her "home room" teacher, in an after-school meeting with the idea of starting a Bible Club at Westside in January 1985. Both Mergens and Westside Principal Findley described the meeting as "brief" with the end result being a denial of Mergens' request (J. Findley; B. Mergens, personal communication, March 8, 1993). Dr. Findley, who was in his first year as principal at Westside in 1984-85, remembers that initially he agreed to the club:

> She came and said . . . "We have a group that would like to meet . . . or that wants to meet and talk about the Bible--is there any problem with that?" And I said, "No." And my assumption was that they were already just meeting on their own in the building and talking. And I said, "Is that what you mean?" . . . And she said "Really? You'd let us meet?" And then I said, "Wait a minute, Bridget, what are you asking me? Are you asking if they could have a designated time to meet?" And she said, "Yes . . . We want a specific time to meet and location and can we do that?" And I said, "Bridget, why don't you just meet and talk about it--because if you go the other way you are going to force me to say no, but if you just get together and meet and not make a big issue out of it we can make it happen." Obviously that's not what Bridget wanted. (J. Findley, personal communication, March 8, 1993)

Mergens' version of the initial meeting differs from that of Dr. Findley's. When asked about Dr. Findley's statements Mergens said,

> That is totally, totally wrong. He hadn't said anything but "No" [during the first meeting]. I can remember saying . . . "Me and some friends would like to get together [nondenominationally]." I wasn't attending any one church at the time . . . When I started getting support from Bellevue Assembly [now Bellevue Christian Center] is when I started going there. I said I wanted to meet informally. I didn't say anything at that first meeting about . . . hey we want you [the school] to endorse us. But then when we started getting into it, it was sort of like well, if your going to turn this into something bigger than what it is then your going to have to treat us like everyone else. We wanted to know if we could go to room x to meet . . . I kind of went in there

> with the attitude . . .. [that] this is real simple, we're just students who want to meet once a week. It was so informal. I had no clue that I was even forming a club. I wanted to get together with some people and just meet somewhere. I didn't want structure. There was no plan, no clue, no nothing. (B. Mergens, personal communication, March 8, 1993)

The same day of the initial meeting with Dr. Findley, Mergens, feeling "totally down," was contacted by a friend, Dan Borman, from a church group at Bellevue Assembly--a group Mergens had on one prior occasion attended (B. Mergens, personal communication, March 8, 1993). During the course of the phone conversation with Borman, Mergens expressed her frustration about being denied permission to use school facilities. Borman then gave Mergens the name of an attorney, Doug Veith, who was one of the leaders of the church group at Bellevue Assembly (B. Mergens, personal communication, March 8, 1993). Before the conversation with Borman, Mergens claims she did not realize there was any further recourse:

> I knew nothing. I had never heard of the Equal Access Act and legally had no clue . . . It sort of happened, you know. It really just happened. Because Dan Borman happened to call me that night and I happened to just say hey, you know, this really stinks . . . Dan brought me some photocopies of the Equal Access Act the next day or two. (B. Mergens, personal communication, March 8, 1993)

An additional point of disagreement between Mergens and Findley centers around Findley's offering of a church, which was less than 100 feet away from Westside property, as an alternative location to meeting in the school. Dr. Findley claims that soon after the initial meeting, he contacted church officials to see if Bridget and the other students could meet, after school, at the church (J. Findley, personal communication, March 8, 1993). The church officials agreed to such an arrangement, according to Findley, but Mergens would not (J. Findley, personal communication, March 8, 1993). Mergens denied that the church was ever offered by the school until attorneys became involved, but admitted in the Federal District Court trial that Findley had mentioned it (District Court Record, 1987). Mergens testified that the church was an unacceptable alternative because of convenience (District Court Record, 1987).

Dr. Findley and administrators at Westside were aware of the Equal Access Act and what it required of public schools who maintained a "limited open forum" and received Federal financial assistance before the January meeting with Mergens. "I was vaguely aware of it. I wasn't real attune to it, but I knew basically what it was about when Bridget came in" (J. Findley, personal communication, March 8, 1993). The trial court record revealed that Equal Access Act was a subject in at least one meeting among Westside administrators in 1984 (Mergens v. Westside, 1987). Dr. Findley said that administrators at Westside were under the assumption that the clubs at Westside did not constitute a "limited open forum" and that school officials felt that the doctrine of separation of church and state prevented the formation of a Bible Club even if it did apply (J. Findley, personal communication, March 8, 1993).

After Mergens had thought about what had happened and what Borman had told her, she called Mr. Veith (her primary attorney)--although she did not meet him until some time later (B. Mergens, personal communication, March 8, 1993). In an early phone conversation with Douglas Veith, Mergens established that she could not afford an attorney:

> I said, "I don't have money and so if this is going to require money you can count me out." He said, "Well, as a Christian friend . . . I'm not going to charge you . . . At the beginning here it's just going to be . . . I'll share some of my friendly legal advice and maybe we won't need anything more." He just gave me advice on my next step. (B. Mergens, personal communication, March 8, 1993)

Through the course of the next few weeks, Mergens spoke with Dr. Findley (in home room and in his office) and Associate Superintendent James Tangdall about the possibility of a Bible Club. Dr. Findley expressed various concerns the Westside administration had with the formation of a Bible Club at Westside--Establishment Clause concerns (allowing a Bible Club to meet at school would be a violation) and others. Findley said the principle concern Westside had with the formation of a Bible Club was the fact Westside had a long-standing policy against special interest or single issue clubs:

> Bridget would tell me the purpose of this club [was that] there are a lot of kids at Westside that did not know God and that's why this group needs to meet. So the message to me was "We're going to do some evangelizing in the process." Although when it went to court Bridget never owned up to that, but Bridget said that on more than one occasion . . . In this district, traditionally, I think they've always really tried to keep both sides of it [an issue] represented. I think that was probably as much a

> dominating thought as anything that whole time--that we [the school] would want both sides of an issue represented and we would sponsor a club that would do that kind of thing. (J. Findley, personal communication, March 8, 1993)

Mergens waited through February to get "on" the School Board's agenda in March--a meeting she attended with Doug Veith, her attorney. At the March 4 meeting, the School Board voted 4-0 to uphold the administration's decision not to allow Bridget Mergens and other interested students to use school facilities for a religious meeting (Ivey, 1985). Mergens recalled how nervous she was at the meeting while explaining to the School Board why she thought the club should be allowed to meet (B. Mergens, personal communication, March 8, 1993). District 66, which Westside High School is a part of, Superintendent Ken Hansen explained to the board that he did not feel the Equal Access Act applied to Westside: "We do not have what in our opinion is a limited open forum. Based on that, we denied access" (Ivey, 1985). In making such a statement, Hansen was implying that Westside's clubs were all "curriculum related"--so a limited open forum did not exist at the school.

After the School Board meeting, Veith advised Mergens of her next step--an attempt to gain a temporary injunction in the federal court system (B. Mergens, personal communication, March 8, 1993). Time was running out for Mergens and other seniors who were going to graduate as they were in the final semester of their senior year at Westside. Mergens and four other Westside students decided that taking their case to court was the only alternative and might also aid other students in the future who were interested in a Bible Club (B. Mergens, personal communication, March 8, 1993). In May of their senior year, the students' request for an injunction was heard by a Federal District Court judge.

The Equal Access Act

A history of Westside Community Schools v. Mergens would not be complete without briefly explaining the major statutory and constitutional components of the case. This section briefly explains the Equal Access Act which was the statutory part of the Mergens case (see Appendix A). Attorneys for both the students and the school district realized that the case would be won or lost depending on how the courts interpreted two basic questions--one statutory and one constitutional (A. Daubman; S. Phillips, personal communication, March 8, 1993):

1. Did the Equal Access Act apply to Westside High School?
2. If it did, did the Equal Access Act violate the Establishment Clause?

These questions are more complicated than they might seem on their face, so some history of the Equal Access Act is necessary for a complete understanding of the principles involved in the case.

The Federal Circuit Courts had ruled on voluntary, student-initiated religious access in a Michigan case more than 20 years earlier and prior to the Equal Access Act. In the Federal Circuit Court case of Reed v. Van Hoven (1965), a federal judge devised an experimental policy of accommodation for religious groups to meet outside the regular school day and teachers were present only as monitors. The judge appeared to be extra careful in his decision to make sure students wishing to be involved in religious activity were not singled out in any way, that school officials were not involved in any way, or, if involved, only in the most limited of ways (Reed v. Van Hoven, 1965).

Sixteen years later a case came before the Supreme Court from the State of Missouri which is even more important in understanding the Equal Access Act and the Mergens case. The case involved college students from the University of Missouri at Kansas City who were attempting to gain access to university facilities. The 11 students involved in the case were members of a Christian religious group known as Cornerstone. The University of Missouri at Kansas City generally encourages student organizations and officially recognizes over 100 student groups. The University excluded Cornerstone because of a 1972 regulation adopted by its Board of Curators which prohibits the use of University buildings or grounds for religious worship or religious teaching. The students claim that this type of discrimination violated their constitutional rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments.

The Federal District Court upheld the University's regulation. That Court reasoned that the Establishment Clause required such a regulation (Chess v. Widmar, 1979). The District Court claimed that it would be impossible to provide facilities without giving prohibited support to an institution of religion (Chess v. Widmar, 1979). The District Court also dismissed student free speech claims because religious speech was entitled to less protection than other types of expression (Chess v. Widmar, 1979). On appeal, however, the Court of Appeals for the Eighth Circuit reversed the District Court's decision. The Court of Appeals found that the University's regulation amounted to content-based discrimination against religious speech and that a policy of equal access does not violate the Establishment Clause (Widmar v. Vincent, 1981). The Court of Appeals went on to hold that a policy of equal access would further the neutral purpose of developing students' social and cultural awareness as well as intellectual curiosity (Widmar v. Vincent, 1981).

The decision of the Court of Appeals was appealed and granted writ of certiorari by the United States Supreme Court in 1981. Justice Powell wrote for the majority of the Supreme Court which affirmed the Court of Appeals decision. The Supreme Court held, among other things, that (Widmar v. Vincent, 1981):

1. The University of Missouri at Kansas City had created an "open forum" and the type of speech regulated

by the university amounted to content based discrimination.

2. The First Amendment protections of speech and association do apply to campuses of state universities.
3. In order to justify its regulation, the University must show a compelling justification (i.e., that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that purpose).
4. The regulation cannot pass this standard of review (i.e., the regulation was not necessary to achieve a compelling interest).
5. A policy of equal access is not in violation of the Establishment Clause; instead, that is what the Establishment Clause requires--neutrality (i.e., an equal access policy passes the three-part Lemon Test established by the Court in 1971).

In short, the Court ruled that the University regulation violated the fundamental principle that state regulation of speech be content neutral and that the University could not justify its regulation as necessary to achieve a compelling governmental interest. The most important holding, for purposes of the Equal Access Act, was that a policy of equal access, with respect to religious access to governmental facilities, is not only constitutionally permissible, but is what the Establishment Clause requires. Additionally, the

Supreme Court held that such a policy passes constitutional muster because it can pass the Three-Prong Lemon Test (Lemon v. Kurtzman, 1971):

1. It has a secular legislative purpose.
2. Its principle or primary effect would be neither to advance or inhibit religion.
3. It does not foster an excessive entanglement with religion.

Using Widmar v. Vincent as a guide, Congress passed the Equal Access Act, or Title VIII of the Education for Economic Security Act, in 1984. To many observers, it was clearly the intent of Congress to codify what the Supreme Court had laid down as law in Widmar v. Vincent--to end discrimination against religious speech in public schools where an open forum exists. While this interpretation may be accurate, it blurs the distinction made by the Supreme Court itself in Widmar v. Vincent. Footnote 14 in Widmar clearly spells out an age or maturity distinction which the framers of the Equal Access Act denied (Widmar v. Vincent, 1981): "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."

Misguided or not, another aspect of the Equal Access Act that is troublesome to the casual observer is the authority of Congress to pass such an Act. Nowhere in the Constitution does it say that Congress shall have the power to make laws about public education--as they did with regard to the Equal Access Act. A significant aspect of the Equal Access Act is how Congress overcame this lack of power in the area of public education. It seems as though the Constitution is clear on this: The Federal Congress has 17 powers (and the "necessary and proper clause") enumerated in Article I Section 8 and the Tenth Amendment gives what powers are left over (where they are not prohibited) to the states or to the people. However, after 200 years of practice and experience with federalism and 200 years of Supreme Court interpretation, Congress is often times able to overcome deficits of power through expanded meanings of other enumerated powers. In the case of the Equal Access Act, Congress used their extremely broad, enumerated power to tax to write a law about public education. While the intent of the law deals with public education and the use of educational facilities, one of its "triggers" is any "secondary school which receives Federal financial assistance."

Even when the Federal Congress writes laws where they clearly have power it is nearly impossible to write a law which will "cover" any given situation. Disagreements over ambiguities and complexities of any law are common and it is the job of the state and federal court system to sort through those disagreements and ambiguities and decide what the law means in a given situation. It is not surprising that the courts will often look to the legislative history of a particular law for guidance. Legislative histories are carefully recorded and used by the courts to settle disputes about a law. An additional problem arises when these histories are ambiguous when applied to a given situation. The Equal Access Act and the Mergens case are no exception. Both sides attempted to use the legislative history of the Equal Access Act to persuade the Federal Court system that a decision in their favor is what Congress intended when they wrote the law (Petitioner's and Respondent's Briefs, 1989).

It seems clear from the legislative history of the Equal Access Act that Congress was attempting to codify the principles the Supreme Court applied to college students in Widmar to public secondary students (Legislative History 20 U.S.C. §§4071-74, 1984). During Senatorial debate over the Equal Access Act, Senator Levin commented (Legislative History 20 U.S.C. §§4071-74, 1984): "[T]he pending amendment is constitutional in light of the Supreme Court's decision in Widmar against Vincent. This Amendment merely extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools." There can be little doubt that Congress intended to extend the principles of Widmar to public secondary school students.

The legislative history also seems to suggest that Congress saw a need to end discrimination and ambiguity with respect to religious speech which existed in secondary schools across the nation (Legislative History 20 U.S.C. §§4071-74, 1984):

> Despite Widmar, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity. Like the judges of the district court in Widmar, they erroneously believe that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted.

Statements such as these suggest Congress, in part, intended to aid public school administrators in their decision-making process about religious speech in their schools.

The conflicting principles of the Equal Access Act are constitutional. That is, on one hand students have constitutional rights of freedom of expression, association, and speech; while on the other hand the same students have constitutional rights which the Establishment Clause protects. The Equal Access Act attempted to strike the balance between two conflicting constitutional values. The Act's stated purpose says (Legislative History 20 U.S.C. §§4071-74, 1984):

> The purpose of this legislation is to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day when the school permits extracurricular activities.

In order to achieve that lofty purpose, Congress relied heavily on principles laid down by the Supreme Court in Widmar v. Vincent (1981).

On first reading, the Equal Access Act appears to apply to most secondary schools in the country. Most secondary schools (if not all) receive some type of federal financial assistance and maintain a "limited open forum" by providing school facilities to one or more noncurriculum-related groups--or do they? One of the initial problems school administrators had with the Equal Access Act was trying to figure out which schools triggered the Act--maintained a "limited open forum." School administrators began examining their forums to see if the Equal Access Act applied to their school. Many school administrators across the country felt as though they had not created a "limited open forum" and therefore were beyond the reach of the Act (Sendor, 1984).

The definition of "limited open forum" was not only troublesome to school administrators; it was also a problem for federal judges. The Equal Access Act defines "limited open forum" in the following way (Equal Access Act, 1984): "A public secondary school has a limited open forum whenever such school grants an offering to or an opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."

Unfortunately, Congress failed to define exactly what they meant by "noncurriculum" so the definition of that word became a significant issue during the Mergens case. If one or more school clubs that met during noninstructional time could be deemed "noncurriculum related," then that school would be subject to the proscriptions of the Equal Access Act. Again, although admittedly ambiguous, the legislative history may be useful in defining "noncurriculum related." During Senatorial debate before passage of the bill, two senators, Senator Mark Hatfield and Senator Slade Gorton, discussed the definition of noncurriculum-related student groups (Legislative History 20 U.S.C. §§4071-74, 1984):

Mr. Gorton: "I gather from the previous remarks of the Senator from Oregon and the Senator from Alabama that the definition of these non-related student groups is fairly broad. The chess club would be such a group. If the school permits a chess club, it has thereby created a limited open forum which brings into effect the proscriptions of the Act."

Mr. Hatfield: "That is correct."

At least in Senator Hatfield's way of defining "noncurriculum related" most public secondary schools that receive federal financial assistance would be subject to the language of the Equal Access Act.

However, these remarks must be understood against the background of a different exchange between the two senators. The following exchange between Senator Hatfield and Senator Gorton casts a different light on the definition of "noncurriculum related" (Legislative History 20 U.S.C. §§4071-74, 1984):

Mr. Gorton: "Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum related?"

Mr. Hatfield: "We in no way seek to limit that discretion."

Mr. Gorton: "So if the school district were to determine that the girls cheerleading squad, for example, should be led by a teacher, it could make the determination that it was curriculum related."

Mr. Hatfield: "Correct."

Mr. Gorton: "And, therefore, the existence of that group would not be a nonrelated forum?"

Mr. Hatfield: "Correct."

Mr. Gorton: "Could the school make the same determination with reference to a chess club?"

Mr. Hatfield "I would not say that no school district could, but I could not readily conceive of a criterion that could be used at this time to establish that as a curriculum-related activity. I am not saying that it could not be, because as long as you have lawyers, they can find ways of doing things one way or another."

This exchange suggests that another aspect of congressional intent, with regard to the Equal Access Act, was to allow local school districts autonomy in deciding what was and was not curriculum related. Others would argue this interpretation would render the Equal Access Act meaningless because school districts could simply claim all of their clubs to be curriculum related thereby avoiding the proscriptions of the Equal Access Act. Like so many statutory disputes, the legislative history of the Equal Access Act leaves room for ambiguity and disagreement.

The Act also creates a large "umbrella" for the kinds of speech it purports to protect--"religious, political, philosophical, or other content." The scope of the Equal Access Act is much broader than its sponsors originally intended. The initial impetus for the law was a perceived need to protect religious speech in public schools but during debates over the bill political, philosophical, and "other" kinds of speech were included. It is hard to imagine a kind of student group that could not find refuge in one of these broad words. Initial reaction to the Equal Access Act in educational periodicals across the Nation (e.g., American School Board Journal and School Administration) reflect an uneasiness about the types of groups who could demand access to school facilities (if the Equal Access Act applied to their school at all). Educators were concerned that young chapters of the KKK or other hate groups would be using school facilities alongside more traditional student organizations.

What was clear to educators was that if the Equal Access Act applied to their school they could not deny access to student-initiated groups on the basis of political or philosophical content. Religious content, the Act's initial aim, was less clear because of conflicting constitutional values and case law on that issue. Administrators who had been taught strict separation of church and state had a hard time making the Equal Access Act, their values and knowledge compatible. For many, it did not seem constitutionally possible for a religious group to meet at school during instructional or noninstructional time. Political and philosophical content differed, in the minds of many educators, because there was not a constitutional amendment that dealt with these.

For a time, the federal court system added to the dilemma and helped set the stage for a constitutional showdown. Even before passage of the Equal Access Act, religious access was a controversial issue in public schools. In 1980, the Second Circuit Court of Appeals upheld a New York school board decision to deny access to a voluntary student prayer group that wished to meet before school (Brandon v. Board of Education, 1980). That court reasoned that students' free exercise rights were not violated since the students had the option of praying elsewhere and students' free speech rights were outweighed by Establishment Clause problems (Brandon v. Board of Education, 1980). Even after the Supreme Court's decision in Widmar, the lower circuit courts were unclear whether the same logic applied to the public high school setting. Many lower courts continued to deny access to religious groups. For example, in Bender v. Williamsport Area School District (1984) the Third Circuit Court of Appeals denied access to a group of students that requested permission to form a voluntary religious club that would meet during the school's activity period. The Third Circuit Court held that while the students had legitimate First Amendment rights and the school maintained a "limited open forum" the school still possessed Establishment Clause concerns that outweighed the students' interests (Bender v. Williamsport Area School District, 1984).

This confusion was one of the aforementioned purposes of the Equal Access Act. Still, several courts continued to deny access to student-initiated groups. A Federal District Court in Texas upheld a school district's policy of not allowing student religious groups to meet before or after school (Clark v. Dallas Independent School District, 1987). The District Court acknowledged that the Equal Access Act applied to the facts in the case, but refused to apply it because of constitutional implications (Clark v. Dallas Independent School District, 1987). The Court held that only a constitutional amendment could change the Fifth Circuit precedent which it was bound (Clark v. Dallas Independent School District, 1987). Finally, the Ninth Circuit avoided applying the Equal Access Act by holding that the school in question did not maintain a "limited open forum" as defined by the Act (Garnett v. Renton School District, 1989). The Court accepted the school board's argument that Chess Club, Bowling Club, and Special Kiwanis Club were all curriculum related (Garnett v. Renton School District, 1989).

Religion, Education, and the Courts

The history of Westside Community Schools v. Mergens cannot be adequately portrayed (or taught) without at least a brief history of its constitutional elements. Courts look to past courts for guidance and direction to rule on present cases through the doctrine of stare decisis. To this extent, how the courts (especially the Supreme Court) have historically treated a particular issue becomes extremely vital to any court's ruling on a present case. Of course, in relation to the Mergens case, the constitutional history would include Supreme Court treatment of religion and the public schools.

The First Amendment to the United States Constitution clearly states who was subject to its restrictions:

> **Congress** shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

However, First Amendment restrictions have come to be applied against the states (and their subdivisions) and not exclusively to "Congress." Although the Supreme Court incorporated (using the Fourteenth Amendment) other aspects of the First Amendment prior to the Establishment or Free Exercise Clauses, the Court did begin applying these First Amendment rights to the states in a 1940 decision--Cantwell v. Connecticut. The logic involved in that decision had been used by previous courts to incorporate other aspects of the Bill of Rights. The Court reasoned that the fundamental concept of liberty contained in the Due Process Clause of the Fourteenth Amendment (which does apply to the states) embraces the First Amendment protection of religious freedom. The Due Process clause of the Fourteenth Amendment states that: ". . . nor shall any state deprive any person of life, liberty, or property, without the due process of law." The First Amendment rights included in the Establishment and Free Exercise clauses were "found" in the word "liberty." After Cantwell, any state law which respects an establishment of religion or prohibits the free exercise of religion is an unconstitutional violation of the First Amendment via the Fourteenth Amendment.

With respect to religion and education, the Constitution contains two important clauses--the Establishment Clause and the Free Exercise Clause. For purposes of the Mergens case, the former is more important than the latter and is included in the history. After all, the constitutional claim presented in Mergens was that Congress had violated the Establishment Clause in passing the Equal Access Act. Moreover, the school asserted the Equal Access Act amounted to a violation because of its requirement that public school facilities be used for religious purposes. While Bridget Mergens and the other Westside students presented other constitutional arguments, the Supreme Court mainly concentrated, in terms of constitutional law, on the Establishment Clause issues.

The Establishment Clause has two popular definitions and many other less popular interpretations. The popular interpretations are the following:

1. The Establishment Clause means that government is not to support religion in any way (monetarily or otherwise)--a separation of church and state.
2. Or, that government can support religion so long as it does so on an equal basis.

From an historical perspective, both definitions can find support but the more convincing evidence may be for the first definition. For example, nearly all the states (nine) ratifying the Bill of Rights had state constitutions which adopted the position that government should not play a role in religion.

This interpretation won out in an important early Establishment Clause case. Justice Hugo Black wrote for the majority of the Court in Everson v. Board of Education (1947):

> The "establishment of religion" clause of the First Amendment means at least this: Neither the state or the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion . . . Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State.

Although the Court upheld a New Jersey law which provided for payment for transporting Catholic children to and from

Catholic school, they accepted Thomas Jefferson's argument that the Establishment Clause erected a wall separating church and state.

Justice Black was the author of another significant Establishment Clause decision in 1948. The issues presented in McCollum v. Board of Education (1948) could be summarized as follows: Could a school district release students from their classes (where parents request it) for Catholic, Protestant, or Jewish instruction in regular classrooms while other students were in another part of the building? Apparently, the Illinois school district was attempting to treat all religions equally by adopting a policy which included three major religions. Even so, the Court struck down the Illinois policy as a violation of the Establishment Clause. In McCollum, the Court appeared to be most interested in the extent of involvement of school officials and the use of "public school machinery." That "machinery" included compulsory attendance laws, the use of the school building, and the use of teachers and administrators for record keeping.

To be sure, by 1950 the Court had erected the wall separating church and state Thomas Jefferson is famous for creating. So-called "shared time," which the Court declared unconstitutional in McCollum, differs from "release time" in one significant aspect--public school facilities are not used in "release time." No religious instruction occurs at the school and all costs (including the application blanks) are paid by the religious organizations. The Supreme Court decided the constitutionality of "release time" programs in Zorach v. Clauson (1952). In Zorach, the Court held that while release time might be unwise from an educational or community viewpoint it was not unconstitutional (Zorach v. Clauson, 1952). Among other things, the Court ruled in Zorach that:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions . . . Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person . . . But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.

The Court went on to claim that to rule against "release time" programs would be reading hostility toward religion into the First Amendment.

During the early 1960s two other significant Supreme Court decisions concerning the Establishment Clause were handed down. The cases, Engel v. Vitale (1962) and Abbington School District v. Schempp (1963), touch on the controversial issue of school prayer. In Engel, the Supreme Court struck down a New York School District policy which required students to recite a Christian prayer as "wholly inconsistent with the

Establishment Clause." In Schempp, the Court struck down a Pennsylvania law which required:

> At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

Again, the Court pointed toward government neutrality with respect to religion:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal government would be placed behind the tenets of one or of all orthodoxies . . . And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference.

As the Supreme Court seemed to continually require government neutrality in Establishment Clause cases, a test evolved which is still in use in Establishment Clause cases today. Chief Justice Warren Burger wrote for the majority of the Court in the 1971 decision of Lemon v. Kurtzman. Speaking for the majority of the Court, Burger announced what the Court's current Establishment Clause test to be (Lemon v. Kurtzman, 1971): "First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not foster 'an excessive government entanglement with religion.'" The so-called Three-Part Lemon Test attempts to insure government neutrality with respect to religion. As with many aspects of constitutional law, the test itself is not "clear cut" and leaves room for disagreement in many Establishment Clause cases. In general, any statute (state or federal) which has a secular purpose, has a primary effect of not advancing or hindering religion, and does not foster excessive government entanglement with religion is constitutionally permissible.

The Court's treatment of the first prong of the Lemon Test (secular purpose) has been at best inconsistent and hard to predict. For example, in Lynch v. Donnelly (1984) five justices on the Court held that nativity scenes served the secular purpose of celebrating the Christmas holiday and depicting its origins. The opening of a daily legislative session with a prayer by a state paid chaplain was also found to have a secular purpose in Marsh v. Chambers (1983). The Court ruled that the practice was "deeply embedded in the history and tradition" of the United States and therefore permissible. However, the Court also ruled a law which required the balanced treatment in the teaching of creationism and evolution did not serve a secular purpose--despite the state legislature's stated purpose to the contrary--in Edwards v. Aguillard (1987). A final example of inconsistency comes from the Supreme Court's decision in Wallace v. Jaffree (1985). In that case, the court turned to the legislative history of the bill (law) in question and found language which indicated that the purpose of the legislation was to return to voluntary prayer in the schools--a nonsecular purpose and therefore a violation of the Establishment Clause.

The second prong of the Lemon Test, that the government policy in question neither advance or inhibit religion, is one which leaves room for disagreement as well. In Grand Rapids School District v. Ball (1985), the Court struck down a "shared time" program. Under the program in question, classes were taught by public school teachers to nonpublic school students. The system also used classrooms leased from nonpublic schools paid for by the public school system. The important part of that decision, for purposes of this history, rests on the fact that the Court refused to distinguish the actual effect from the perceived effect--neither will pass constitutional muster. Perception was also a central issue in the previously mentioned case of Widmar v. Vincent (1981). The majority in that case ruled that University students are capable of distinguishing (perceiving) between a policy equal access (religious toleration) and government advancement of religion. The question which the Court had to resolve in Mergens was whether or not this same logic could be applied to secondary school students. In other words, are secondary school students mature enough (cognitively) to distinguish between toleration and the advancement of ideas?

The final prong of the Lemon Test asks whether or not the governmental policy fosters an excessive entanglement between government and religion. Excessive entanglement may take on different forms depending on the facts of a case. Government and religion may become excessively entangled where public funds serve to aid religion (e.g., McCollum v. Board of Education, 1948). Certain types of continued supervision by governmental employees of a religious activity have also been banned by lower federal courts as fostering excessive government entanglement (e.g., Lubbock Civil Liberties Union v. Lubbock Independent School District, 1982). The Equal Access Act itself addresses this issue by requiring school officials to serve only in a nonparticipatory function--maintaining discipline and order. Under the third prong it is possible for the benefits to a particular group to be "incidental" while accommodating religion. This philosophy was first articulated by the Court in Zorach v. Clauson (1952).

Federal Judge Denies Injunction

To be sure, the framework--legal and historical--of Westside Community Schools v. Mergens is a complex combination of statutory and constitutional law. While attorneys for the school district and the students argued from a variety of angles, the two basic questions which emerged were:

1. Did the Equal Access Act apply to Omaha Westside High School?
2. If it did, was the Equal Access Act constitutionally impermissible with respect to the Establishment Clause?

Success or failure for either side depended on how the Federal Court system would answer these questions. Both sides prepared their arguments with these questions in the front of their minds and attempted to persuade the courts that they had the "right" answers (A. Daubman; S. Phillips, personal communication, March 8, 1993).

United Sates District Court Judge C. Arlan Beam heard nearly two hours of testimony at a hearing May 10, 1985, to decide if a temporary injunction should be granted allowing Bridget Mergens and other interested students at Westside High School to meet at school and talk about the Bible. During the testimony, the students contended that their constitutional rights (Freedom of Speech and Assembly) were violated by the school when the school denied their club access to Westside facilities ("Judge Won't Tell School," 1985). School officials claimed that use of the school for a religious purpose would violate the "separation of church and state" ("Judge Won't Tell School," 1985).

Judge Beam, in a memorandum filed in U.S. District Court, said the students failed to meet their legal requirements for issuing a temporary injunction against the school. For an injunction to be issued, the students had the burden of proving that they would be irreparably harmed if an injunction was not issued. Still, the judge went on to say that there were "significant questions" about the constitutionality of the Equal Access Act and a full hearing should be held on the issues the case presented "as soon as reasonably possible" ("Judge Denies Order," 1985).

The denial of the federal injunction proved to be the last chance for Bridget Mergens and other graduating seniors who were interested in forming a Bible Club. The decision was handed down just before graduation in 1985. Other interested students remained at Westside and joined in the suit periodically. This may have been important due to the "standing" requirements in the federal court system. Since Mergens had graduated and the issue had become "moot" with regard to her, it may have been important to have current students (who could be affected by a favorable judgment) become a part of the lawsuit. This point was not decided by any court since current Westside students were always a part of the case and standing requirements were always met.

Pretrial Thoughts, Issues, and Facts

Although Bridget Mergens graduated, interest in the Bible Club, students' constitutional rights, and the case remained at Omaha Westside High School (Steinike, 1985). The students who were interested in the Bible Club at Westside started meeting at private homes of students in February, 1985, and continued to meet once a week well after graduation in 1985 (B. Mergens, personal communication, March 8, 1993). These meetings continued, with Bridget Mergens in attendance, until April of 1987 (B. Mergens, personal communication, March 8, 1993).

After the federal injunction was denied, Doug Veith advised Mergens of the students' next step in the legal process (B. Mergens, personal communication, March 8, 1993). Since Mergens' financial resources were limited as a high school student (and later as a college student), funding was sought and obtained by the National Legal Foundation--a Christian legal service with a $2 million dollar a year budget supported by private contributions (B. Mergens, personal communication, March 8, 1993). During an interview March 8, 1993, Mergens clearly spelled out who decided to take Westside High School to court (B. Mergens, personal communication, March 8, 1993):

> He [Doug Veith] couldn't make the decision for us--I made the decision to go to court. Doug didn't help me at all. He just said "Well, if you really want this--this is kind of the next step . . . At first I was like "Well, there is no way that I could do anything like this. I'm barely 18 years old, I don't know anything about law, and what could I possibly do to help." Initially, the next step involved a meeting at an Omaha hotel among students, their parents, and the attorneys who were to represent them. The attorneys identified what was at stake and the legal questions involved.

According to the District Court record, the students were represented at trial by Doug Veith from Bellevue, Nebraska, and the attorneys from the National Legal Foundation--Robert K. Skolrood and Douglas W. Davis from Virginia Beach, Virginia (Mergens v. Westside, 1987). Westside High School was represented by Alan E. Daubman and Vern Moore, Jr. (Omaha, Nebraska) (Mergens v. Westside, 1987). As the case progressed from the Federal District Court, other attorneys were added by both sides. By the time the case was heard by the Supreme Court, Westside High School added four attorneys from the American Jewish Congress to the list which appears on the petitioner's brief (Mergens v. Westside, 1987). Those attorneys include Mark D. Stern, Amy C. Aldeson, Lois C. Waldman, and Jeremy S. Garber all from New York, New York. The respondents brief to the Supreme Court included the attorneys previously mentioned and Charles E. Rice (Notre Dame, Indiana), Eric Alan Daly (Washington, D.C.), James M. Henderson (Washington, D.C.), and Jay Alan Sekulow (Virginia Beach, Virginia). Oral arguments at the Supreme Court were presented by Alan E. Daubman on behalf of Westside High School and Jay Alan Sekulow on behalf of the Westside students.

Alan Daubman, the primary attorney for Westside High School throughout the Mergens case, initially posed possibilities to the school depending on alternative courses of action--since many questions remained about the Equal Access Act and how the courts were defining it at the time (A. Daubman, personal communication, March 8, 1993). Early on in the Mergens case, it seemed clear to both the school and its attorneys that a law suit was likely no matter how the school decided to respond to Bridget's request (A. Daubman, personal communication, March 8, 1993):

> The school district was probably faced with a law suit no matter which decision it made. If it had made the decision not to permit the Bible Club--as it did--it was relatively certain that a law suit was going to be filed. There were also very strong indications that if the Bible Club were allowed to meet . . . that some strong

> possibility of a lawsuit being filed by other factions as well. My best recollection . . . is that there was general consensus that there was likely going to be a law suit in any event and therefore the district ought to proceed to make as good a decision as possible and not worry about getting sued because that seemed inevitable no matter what the decision was.

A key issue in the initial decision-making process by the school was whether or not the Equal Access Act applied to Westside High School (A. Daubman, personal communication, March 8, 1993). Westside High School was and is a public secondary school that receives federal funding. The Act's other trigger--maintenance of a "limited open forum"--was an issue that received considerable early scrutiny from Westside's counsel (A. Daubman, personal communication, March 8, 1993):

> Since all of the clubs [at the time] were sponsored by the school district . . . Faculty sponsors had varying degrees of control but unvarying degrees in terms of policy and what sort of control was expected. What was being presented by Bridget Mergens' request was a club of a different nature. A club in which there would not be faculty sponsorship--in fact that is specifically excluded or prohibited by the Equal Access Act because of the religious nature of it . . . One of the threshold questions was whether or not the Equal Access Act compelled school districts to accept into the fold true student initiated clubs without faculty sponsor on terms entirely different than all other clubs operated under at the school . . . Are we forced to change our forum to accommodate that club [if the Equal Access Act applied]?

If Daubman and the school district could prove that the Equal Access Act did not apply to Westside--that Westside's clubs were all curriculum related--then their decision not to allow the club would be acceptable at least in terms of the Equal Access Act.

The other early concern of the school district, according to Daubman, was not related to the Bible Club or the students involved in the Bible Club, rather the effects of decision to change whatever forum existed at Westside to accommodate the Bible Club (A. Daubman, personal communication, March 8, 1993). If the Bible Club was allowed to exist at Westside without sponsorship (which was required by the Equal Access Act), then Westside would be compelled to allow other clubs to exist without sponsorship. In other words, Westside would be compelled to allow student-initiated clubs which it deemed to be inappropriate for the educational environment. The opening of a school's forum was a concern of Westside and many other secondary schools across the country as the implications of the Equal Access Act were considered (Baron & Bishop, 1991; Goldsmith, 1990). However, at the time of the writing of this thesis, no published material could be found stating that student-initiated hate groups had surfaced as a result of the Equal Access Act or the Supreme Court's decision in Westside Community Schools v. Mergens. This is not to say that either the Equal Access Act or the decision in Mergens open that up as a possibility.

Both the students and the school had to wait nearly two years for their case to be heard by a Federal District Court. During that time, Bridget Mergens talked occasionally with Mr. Veith about how the case was progressing (B. Mergens, personal communication, March 8, 1993). Mostly, the time between the denial of the federal injunction in May, 1985, and the trial in May, 1987, was used by attorneys for both sides to prepare their cases. The basic tenets of arguments presented by the school could be characterized as the following (Mergens v. Westside, 1987):

1. The Equal Access Act does not apply to Westside High School.
    a. Westside does not maintain a "limited open forum" as defined by the Equal Access Act.
    b. All of Westside's clubs must have official sponsorship in accordance with Westside School Board Policy 5610 (see Appendix B).
    c. All of Westside's clubs are related to the curriculum.
    d. Westside has legitimate pedagogical concerns for refusing to recognize a Christian Bible Club.
2. The Equal Access Act is at odds with the Establishment Clause.
    a. High school students are generally not mature enough to distinguish between religious endorsement and religious toleration.
    b. The union of church and state, created if the Bible Club were allowed at Westside, is constitutionally impermissible with regard to the Establishment Clause.

   c. The students seek official endorsement of the religious club.
   d. An officially sponsored Bible Club would entangle the school with religion.

In short, Westside argued that while schools exist which have a "limited open forum" that would trigger the Equal Access Act, Westside was not one of those schools (Mergens v. Westside, 1987). And, that the students were not complaining about obstacles to religious speech (Westside allowed students to meet informally), but the school's refusal to lend them its prestige and endorsement (Mergens v. Westside, 1987).

Obviously, the students argued from an entirely different perspective as they tried to convince the District Court of exactly the opposite positions. The basic tenets of their arguments include the following (Mergens v. Westside, 1987):

1. That Westside's ban of voluntary and student-initiated clubs is an unconstitutional infringement on students' free speech rights protected by the First and Fourteenth Amendments.
   a. Public school students have First Amendment rights of Freedom of Speech and Freedom of Association.
   b. Religious discussion and worship are forms of speech protected by the First Amendment.

2. That the club system at Westside amounts to a "limited open forum" or a public forum from which a student-initiated Bible Club may not be banned.
    a. The Equal Access Act applies to Westside High School.
    b. Westside's clubs create a "limited open forum."
3. That the Equal Access Act is constitutional--it does not violate the Establishment Clause.
    a. The Equal Access Act has a secular legislative purpose.
    b. The Equal Access Act does not have the primary effect of advancing religion.
    c. The Equal Access Act does not foster excessive government entanglement with religion.

The attorneys representing the students hoped to show the Federal District Court that the Equal Access Act applied to Westside High School and that the Act was constitutional. Also, counsel for the students wished to show that Westside's ban on the proposed religious club was unconstitutional--even without the Equal Access Act--as a violation of students' First Amendment rights of Freedom of Speech and Association.

Federal District Court Trial Ends In Favor of Westside High School

On April 8, 1987, Mergens v. Westside went to trial in the United States District Court for the District of Nebraska. The same judge who had heard the students' request for an injunction presided over the trial--C. Arlan Beam. The suit brought by Bridget Mergens and other Westside students was a civil action calling for declaratory and injunctive relief, for damages and attorneys' fees for violating the United States Constitution and the laws of the United States. The trial lasted 5 days and a decision was not handed down for nearly a year after the trial (February 2, 1988) (Mergens v. Westside, 1987). The evidence presented at trial in District Court was even more important in light of the federal appeals process--no other witnesses can be called at the appellate court levels. The testimony during the trial would be the same testimony that the Court of Appeals and the Supreme Court would review. This section highlights testimony of key witnesses and Judge Beam's opinion.

Twenty-seven witnesses were called by the plaintiffs (no additional witnesses were called by the defendants) ranging from students at Westside High School to experts in education and psychology (District Court Record, 1987). Witnesses included (District Court Record, 1987):

- Roxanne Abbot (student)
- Anne Breitinger (student)
- Sandy Carbaugh (student)
- Keven Coates (student)
- David Harris (student)
- Michelle Harris (student)
- Lisa Healy (student)

- Jennifer Hilt (student)
- Rick Hustig (student)
- Kendra Kellison (student)
- Jeff Ramsell (student)
- Brian Rensing (student)
- Derek Stoneburg (student)
- Kevin Brown (student)
- Bridget Mergens (student)
- Chris Polen (student)
- Steven Hollar (student)
- Andrea Simmonds (student)
- Wayne W. Meier (president of Westside School Board)
- James E. Findley (principal)
- James A. Tangdall (assistant superintendent)
- Kenneth K. Hansen (superintendent)
- Ron F. Huston (assistant principal)
- Sandy Skar (student)
- Grey Talborg (student)
- Dr. Ward Sybouts (expert witness)
- Dr. Joseph C. LaVoie (expert witness)
- Dr. David S. Moshman (expert witness)

Much of the questioning and testimony centered on the critical issue of the forum which existed at Westside High School (District Court Record, 1987). Again, the students attempted to show that Westside maintained a "limited open forum" thereby invoking the proscriptions of the Equal Access Act

(District Court Record, 1987). Whereas the school attempted to show that Westside maintained a "closed forum" or at least a forum which did not invoke the proscriptions of the Equal Access Act (District Court Record, 1987). Other important testimony centered on the definition of "curriculum related" and on secondary students' cognitive ability to distinguish between religious toleration and religious advancement (District Court Record, 1987).

Whether or not the Equal Access Act applied to Westside depended on the nature of the forum that existed at the school. If Westside maintained a "limited open forum," the Act clearly applied. This, in turn, depended on whether Westside had even one club that was "noncurriculum related." Thirty clubs existed at Westside High School in 1984-85 (see Appendix B). The plaintiffs maintained that at least 10 of the clubs at Westside were not curriculum related thereby invoking the Equal Access Act (District Court Record, 1987). The 10 clubs that were thought not to be curriculum related by the students are (District Court Record, 1987):

- Interact
- Chess
- Subsurfers
- National Honor Society
- Photography
- Welcome to Westside
- Future Business Leaders of America

- Zonta
- Student Advisory Board
- Student Forum

The types of clubs, the purpose of the clubs, and the kinds of faculty sponsorship were all important issues that related to defining what Congress had left unresolved (District Court Record, 1987).

Several students testified about the clubs which existed at Westside High School (District Court Record, 1987). The first student to be called as a witness who belonged to one of the clubs that was claimed to be "noncurriculum related" was Michelle Marie Harris (District Court Record, 1987). Harris testified that she was a member of the Drama Club and Welcome to Westside Club (District Court Record, 1987). She testified that while she was a member of Drama Club she was not a member of drama class (District Court Record, 1987). Further, she testified that the club's function was to sponsor student events such as plays and dramas (District Court Record, 1987). However, Harris was not certain whether these events related to a particular class at Westside (District Court Record, 1987):

Doug Veith: "Were those student events?"

Michelle Harris: "It was from the Westside student class. I don't know if it was from a class in particular."

Another student who testified about the clubs in question was Bryan Rensing (District Court Record, 1987). Rensing testified that he felt that Welcome to Westside Club was not tied to any class at the school (District Court Record, 1987):

Doug Veith: "Was Welcome to Westside Club a required club that would be in for sociology or something like that?"

Bryan Rensing: "No."

Doug Veith: "Was--did you receive a grade in any course, an extra credit in any course, by reason of having been in Welcome to Westside?"

Bryan Rensing: "No."

Doug Veith: "You weren't required to attend the club?"

Bryan Rensing: "No."

Doug Veith: "And you weren't required to attend any class, correct?"

Bryan Rensing: "No."

Doug Veith: "Is there any class that you can conceive of that Welcome to Westside was tied to?"

Bryan Rensing: "No."

Rensing also testified that he felt several other clubs and activities at Westside were not related to the curriculum at Westside--including the football team and drill team (District Court Record, 1987).

The Westside administration had a different opinion of the relationship of the 30 clubs which existed at Westside and the curriculum (District Court Record, 1987). Westside Principal James Findley testified that all Westside clubs were curriculum related--including the 10 clubs which the plaintiffs maintained were "noncurriculum related" (District Court Record, 1987):

Doug Veith: "Now, Dr. Findley, in your opinion are all of those clubs at Westside High School related to the curriculum?"

Dr. Findley: "Yes they are."

Doug Veith: "Would you please explain to the Court how Chess Club is related to the curriculum?"

Dr. Findley: "Curriculum to me includes all of the required courses, our elective courses, all of the activities and clubs, activities that fall in the curriculum as part of the co-curricular part of it, and there would be a number of other things that would fall in there, as well, but definitely I've always thought of activities as part of our curriculum."

* * *

Doug Veith: "So just the very fact that it's a club at Westside High School makes it curriculum, in your opinion, is that correct?"

Dr. Findley: "The fact that it is a club grows out of a mission and goals for us, and what I believe parents would expect or would think appropriate to offer, yes."

Doug Veith: "When you say 'mission and goals,' what mission or goal is fulfilled by the Chess Club at Westside High School?"

Dr. Findley: "Oh, I think there could be a number of things. First of all, I think a lot of activities are provided for young people to become involved and feel good about themselves and there's a great deal of information that indicates that kids who are really successful in school are also heavily involved in activities, so that their time is utilized and they don't have just spare time on their hands, and the majority of kids who are successful in school are involved in activities. So to just be in an activity itself, we have always felt to be important to the curriculum at Westside High School but it also allows students an opportunity to do critical thinking, logic, those kinds of things that are extensions of what we have as goals and objectives for a number of courses in what we do."

One of the "missions or goals" Dr. Findley refers to in his testimony is School Board Policy 5610 (see Appendix C). Dr. Findley testified that in deciding whether or not to accept a new club at Westside he consulted School Board Policy 5610 to see if the proposed club "fit" into the mission and goals of the School (District Court Record, 1987). Mr. Veith continued to ask Dr. Findley how various Westside Clubs were related to the "mission and goals" (School Board Policy 5610) at Westside and about the relationship between the club and its faculty sponsor (District Court Record, 1987). Dr. Findley continued to explain why he felt Westside's clubs were all curriculum related (District Court Record, 1987).

The definition of curriculum or noncurriculum was and is not a clear issue. To help define that important word the plaintiffs called an expert witness from the University of Nebraska--Dr. Ward Sybouts (District Court Record, 1987). Sybouts is considered an expert in the field of curriculum development with specialization in school activities (District Court Record, 1987). The ambiguity of the word is evident in dictionary definitions. For example, Webster's New World Dictionary (1990) defines curriculum as: "A course of study in a school" (p. 149). The American Heritage Dictionary of the English Language (1971) defines curriculum as: "1. All of the courses of study offered by an educational institution. 2. A particular course of study, often in a special field" (p. 324). Dr. Sybouts wrote and testified the following definition of curriculum (District Court Record, 1987):

> While there are numerous definitions for the curriculum of schools, it is defined here as the total of all school related experiences provided for the growth and development of pupils. The curriculum can be categorized as follows:
> A) required courses and mandated programs;
> B) elective courses;
> C) school activities programs;
> D) auxiliary services and student affairs,
> All four elements are needed.

Dr. Sybouts, even though he was called as a witness for the students, testified that student activities and clubs are curriculum related (District Court Record, 1987):

Alan Daubman: "From your personal view as an expert in this area, do you define student activities and clubs as curriculum?"

Dr. Sybouts: "Yes, I do."

However, Dr. Sybouts went on to testify, in his opinion, some of Westside's clubs were "noncurriculum related" because they did not relate to a specific class at Westside (District Court Record, 1987). Examples of noncurriculum-related clubs at Westside, in Dr. Sybouts' opinion, are Interact and Student Forum (District Court Record, 1987).

The statutory component of the Mergens case, and its related significant testimony, is important and had lasting implications in defining the Equal Access Act. Equally important was key testimony centering on the constitutionality of the Equal Access Act. Since the Supreme Court had already ruled on a similar equal access case at the university level (Widmar v. Vincent, 1981) and since the Equal Access Act, at least in part, was based on that decision, the critical question which emerged was how similar secondary public school students are to their university counterparts. In other words, are secondary students similar enough to university students for the principles of Widmar v. Vincent to apply to Westside High School? If the Court held that secondary students were not able to distinguish between religious toleration and advancement, then the Equal Access Act was in jeopardy of failing the Three-Prong Lemon Test making the Equal Access Act constitutionally impermissible with respect to the Establishment Clause.

To aid in answering these important questions, the students called another expert witness from the University of

Nebraska--Dr. David Moshman. Moshman was an Associate Professor (now Professor) in the Educational Psychology Department at the University of Nebraska and has published several articles and books in the area of Developmental Psychology (District Court Record, 1987). One of Moshman's books, Children, Education, and the First Amendment, is particularly relevant to the Mergens case in that it interprets the First Amendment as it would apply to children using empirical research done by Moshman himself (Moshman, 1988). Moshman testified to a cognitive maturity line that could be drawn to distinguish between children who could recognize the difference between governmental, religious advancement, and toleration (District Court Record, 1987):

Doug Davis: "Could you identify for the court at all a definitive line when that final stage [formal operations] is reached in, say, the majority of children?"

Dr. Moshman: "I think the only definitive line you can talk about is the line of when should the majority of children be capable of formal operational reasoning, and I would say that's about age eleven or twelve, that is, children beginning at about age--beyond the age of twelve or so all seem to be capable of formal reasoning. They differ greatly on how widely they apply it, how well it's consolidated and applied to different content, how efficiently they use this reasoning, and there is no clear cut line on that further development. But in terms of the formal abstract abilities being present, I'd say they're present in virtually all normal individuals by around age twelve or so."

Moshman admitted that the first years beyond his line (12, 13, and 14) may be construed differently by other experts in the field of developmental psychology (D. Moshman, personal interview, March, 8, 1993):

> That's where you would probably find some disagreement among psychologists. I would tend to go down as low as age 12 or so. I would make the same argument, as far as the Equal Access Act, with junior high--not with elementary. I would draw the line between elementary and junior high. Many psychologists though would disagree with me on that and would suggest early adolescents, junior high age, are really significantly different than later adolescents . . . There clearly are differences all along the way. It depends on how you judge which differences are most important to the issue and how great those differences are.

Disagreement among psychologists about the cognitive abilities of junior high students and their ability to distinguish between government advancement of religion and government toleration of religion is less important to the Mergens case (the students at Westside were all high school students) but extremely important to the Equal Access Act. The Equal Access Act applied to all secondary schools--including junior high schools. If junior high students were found to be unable to discriminate between advancement and toleration then the constitutionality of the Equal Access Act could be called into question.

United States District Judge C. Arlan Beam handed down his decision in Westside v. Mergens February 2, 1988. The order on the memorandum was short and simple (Mergens v. Westside, 1987):

> 1. Judgment should be and hereby is entered in favor of the defendants [Westside High School].
> 2. The plaintiff's [Bridget Mergens and other Westside students] complaint should be and hereby is dismissed.

While the order was simple, the text of Judge Beam's opinion was not (Mergens v. Westside, 1987). In reaching his ruling, several controversial statutory and constitutional issues had to be decided and delicately balanced. At the heart of Judge Beam's ruling were two significant holdings (Mergens v. Westside, 1987). He ruled that Westside had not created a "limited open forum" as the term was used in the Equal Access Act or by the Supreme Court in Widmar v. Vincent (1981) and that Westside's denial of access to Mergens' and other Westside students did not violate the students' First Amendment rights of Free Speech or Free Exercise in light of the earlier "closed forum" ruling (Mergens v. Westside, 1987).

After attending to the relevant constitutional and legal background, Judge Beam concentrated on the kind of forum he felt existed at Westside in light of the evidence presented at trial (Mergens v. Westside, 1987). He noted the Supreme Court had found the University of Missouri at Kansas City to have a "limited open forum" because the University had made its facilities "generally available" for use by student groups, and had enacted a policy of "accommodating" and "encouraging" student group meetings (Mergens v. Westside, 1987). Moreover, the Supreme Court held that the University had recognized numerous student organizations (100), representing a broad spectrum of topics and interests (Mergens v. Westside, 1987). However, Judge Beam cautioned that the Supreme Court conceded in Widmar that their holding was narrow, and limited to instances where a forum "generally open to student groups" had been created (Mergens v. Westside, 1987). Perhaps more pertinent to the Mergens case, his opinion notes the then recent Supreme Court holding in Perry Education Association v. Perry Local Educators' Association (1983) which outlined determining factors in deciding whether school facilities are "open forums": ". . . school facilities may be deemed public forums only if school authorities have 'by policy or practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public such as student organizations." Finally, Judge Beam pointed out that in terms of the Equal Access Act the question is somewhat more focused turning whether or not Westside permitted even one non-curriculum club to meet on school premises (Mergens v. Westside, 1987).

The Judge accepted the School Board's argument that Westside's forum differed significantly from the University of Missouri at Kansas City's forum (Mergens v. Westside, 1987). Judge Beam wrote (Mergens v. Westside, 1987):

> Upon consideration of all the facts, the Court concludes that Westside High School has not created a limited open forum as that term is used in the Equal Access Act or in the Supreme Court's analysis in Widmar and Hazlewood. Clearly the facts do not establish that Westside High School has a policy or practice of "indiscriminate use"

> of its facilities by student organizations or by the general public. In fact, Westside High School has only sparingly permitted, outside the classroom setting, the use of school facilities for political, social, or economic discussions. The Court is convinced that those clubs which are currently permitted to utilize the facilities at Westside High School are curriculum related and tied to the educational function of the institution. The club system plan at Westside High School differs dramatically from those found to create an open forum policy in Widmar and Bender. These differences justify an alternate conclusion in this case. The Court, therefore, finds that Westside High School has not created an open or limited open forum which now requires access to its facilities by the plaintiffs' club.

In so ruling, Judge Beam accepted the logic of Dr. Findley and other Westside administrators that all of Westside's clubs were related to the curriculum--including the 10 clubs identified by the students as being noncurriculum related. The basic thrust of that logic was that all Westside clubs grow out of "mission or goals" which are articulated by School Board Policy 5610, have faculty sponsorship, and are curriculum related in direct and indirect ways.

Obviously, the Mergens case presented Judge Beam with more than just statutory interpretation of the Equal Access Act. The constitutional elements of Mergens are at least as important and arguably more important than the statutory elements. Interestingly, a significant aspect of Judge Beam's opinion came in Footnote 1 where the Judge accepts the testimony and logic of Dr. David Moshman and rejects the School Board's contention that high school students are significantly different than university students thereby discounting the Supreme Court's holding in Widmar v. Vincent

(Mergens v. Westside, 1987). Moshman had testified that there were no significant differences between high school students and college students in their ability to understand endorsement or nonendorsement by the school (District Court Record, 1987). Judge Beam went on to restate a principle the Supreme Court had laid down previously (Committee for Public Education v. Nyquist, 1973) that a religious organization may receive "incidental" benefits from government without the creation of constitutional violation (Mergens v. Westside, 1987). In the Mergens case, the incidental benefit would be use of school facilities for religious purposes. Although Judge Beam did not expressly write in his opinion that the "Equal Access Act is constitutional" (this issue did not have to be reached since Judge Beam ruled that the Act did not apply), that was the implicit message in his decision (Mergens v. Westside, 1987).

Another constitutional issue which was raised by the students was whether, regardless of the forum in existence at Westside, the school's refusal to permit the students' religious club to meet violated the students' First Amendment rights to Free Speech and Free Exercise (Mergens v. Westside, 1987). On the Free Speech claim, Judge Beam considered Hazlewood v. Kuhlmeier (1988) as controlling in light of the closed forum ruling (Mergens v. Westside, 1987). In so doing, Judge Beam then had to look for "legitimate pedagogical reasons" for Westside's denial of religious speech in the

Mergens case (Hazlewood School District v. Kuhlmeier, 1988). He found that the school's goal of presenting a balanced view when political, religious, and economic information is dispensed within school facilities to be a "legitimate pedagogical reason" (Mergens v. Westside, 1987). Judge Beam dismissed the Free Exercise claim because Bridget Mergens, or any of the Westside students, were not denied permission to engage in informal religious discussions at school--in fact this was something Dr. Findley encouraged (Mergens v. Westside, 1987). Had informal religious discussions been prohibited at Westside then serious constitutional questions could have been raised (Mergens v. Westside, 1987). The Free Exercise holding was direct (Mergens v. Westside, 1987): "In this case, the court holds simply that Westside High School need not permit its facilities to be used by a school sanctioned Christian Club."

Eighth Circuit Court of Appeals Reverses

Bridget Mergens and the other Westside students promptly appealed the decision of the Federal District Court to the United States Court of Appeals, Eighth Circuit. Again, at the appellate court level no new testimony is allowed making the trial court record controlling in terms of testimony. This is not to say attorneys for the students and the school could not make variations to the arguments they had presented before Judge Beam in the District Court. The basic issues involved in the case remained the same; however, the results were much different. A three-judge panel in the Eighth Circuit reversed the District Court ruling holding that the Equal Access Act does apply to Westside High School and is constitutional (Mergens v. Westside, 1989). Circuit Judge Theodore J. McMillian wrote for the Court which included Chief Judge Donald P. Lay and Senior Circuit Judge Floyd R. Gibson.

Without a doubt, the critical issue, whether Westside maintained a "limited open forum," remained the same and again turned on the definition of "noncurriculum related." The Eighth Circuit rejected the testimony and explanations of Dr. Findley in regard to Westside's forum that the District Court had accepted (Mergens v. Westside, 1989). Looking to congressional intent and the legislative history of the Equal Access Act, the Eighth Circuit declared Westside to maintain a "limited open forum"--without citing specifically which clubs at Westside were "noncurriculum related" (Mergens v. Westside, 1989). Among other things, Judge McMillian wrote (Mergens v. Westside, 1989):

> Allowing such a broad interpretation of "curriculum related" would make the Equal Access Act meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result Congress sought to prohibit by enacting the Equal Access Act. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech by that group . . . Therefore, Westside High School maintains a limited open forum, and the Equal Access Act forbids discrimination

> against appellants' proposed club on the basis of its religious content.

Also missing from the Circuit Court opinion is any explanation of why the Court rejected the school's reasoning of how their clubs were tied to the curriculum--the same reasoning the District Court had accepted (Mergens v. Westside, 1989).

Once the Circuit Court established that the Equal Access Act applied to Westside High School, they turned their attention to the constitutionality of the Equal Access Act. In so doing, the Circuit Court turned to the Supreme Court's ruling in Widmar saying that the facts in Widmar "are quite similar to the facts in the instant case" (Mergens v. Westside, 1989). The Circuit Court went on to hold that (Mergens v. Westside, 1989): "Any Constitutional attack on the Equal Access Act must therefore be predicated on the difference between secondary school students and university students." On this point, the Circuit Court looked to congressional fact finding which explicitly rejected the difference between high school students and college students (Mergens v. Westside, 1989). They accepted the evidence Congress found in "leading legal periodicals" that students below college age can understand that an equal access policy is one of state neutrality toward religion, not one of state favoritism (Mergens v. Westside, 1989). However, this reasoning expressly rejects Footnote 14 in Widmar (Widmar v. Vincent, 1981): "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." Obviously, Congress intended to apply the principles of Widmar to public secondary students--what is less obvious is whether the Supreme Court intended the same thing.

Tracking the language of the Supreme Court's ruling in Widmar, the Circuit Court held that the Equal Access Act passed the Court's Three-Prong Lemon Test therefore finding no constitutional violation of the Establishment Clause. One final holding in the Eighth Circuit's opinion concerns the way that Court would have ruled in Mergens even in the absence of the Equal Access Act (Mergens v. Westside, 1989): "Therefore, even if Congress had never passed the Equal Access Act, our decision would be the same under Widmar alone." Besides the previously mentioned Footnote 14 in Widmar, this line of reasoning ignores what the Ninth Circuit had found during the same year (Garnett v. Renton School District No. 603, 1989): "The impressionability of young students, compulsory attendance laws that make students a captive, and the role of public schools in inculcating democratic ideals--distinguish public secondary schools from universities." Most high school students, by state law, have to attend school whereas the state does not provide a similar law for students to attend college. Clearly, this is a difference which exists between the two forums presented in Widmar and Mergens--the question remained whether or not it was a significant difference. The issues presented in Mergens were ripe for a Supreme Court ruling.

The Supreme Court Upholds the Eighth Circuit and the Students

The Westside School Board decided to appeal the Eighth Circuit's decision to the United States Supreme Court. Westside Principal James Findley and then Westside Superintendent Ken Hansen did not know why that decision was made by the School Board (D. Findley; K Hansen, personal communication, March 8, 1993). However, an article which appeared in the Westside student newspaper, The Lance, cited monetary motivations as a possible incentive for the school to appeal (Bonham, 1989). The article reports that Westside had spent $70,000 in legal fees through the decision in the Eighth Circuit and an additional $30,000 would be necessary to appeal to the Supreme Court (Bonham, 1989). The article goes on to quote Westside School Board member Shari Hofschire as indicating that a clause in the District's insurance policy would pay for the students and a majority of the district's legal fees only if the district appealed the decision to the Supreme Court (Bonham, 1989). Had the District not appealed, they would have been responsible for both the students' and the District's legal fees (Bonham, 1989). The Westside School Board discussed the issue in executive session (Bonham, 1989).

Of the hundreds of appeals made to the Supreme Court every year, only a small portion are granted writ of certiorari and heard before the United States Supreme Court.

Since much confusion and a circuit court split still existed on the issue of religious access to public schools, the timing was right for Westside. Certiorari was granted in the Mergens case and argued before the Supreme Court January 9, 1990. The Supreme Court handed down an 8-1 decision June 1, 1990, to uphold the decision of the Eighth Circuit in favor of the students. Justice Sandra Day O'Conner wrote for a divided Court in Mergens (Westside v. Mergens, 1990). Justice O'Conner outlined the Mergens case as presenting two basic issues (Westside v. Mergens, 1990):

1. Did the Equal Access Act prohibit Omaha Westside High School from denying a student religious group to meet during noninstructional time?
2. If so, was the Equal Access Act constitutionally impermissible with regard to the Establishment Clause?

Seven additional judges agreed with O'Conner in answering the first question affirmatively, but only three other justices, Chief Justice Rehnquist, Justice White, and Justice Blackmun, joined O'Conner in answering the second question in the same way, negatively (Westside v. Mergens, 1990). On the constitutional question, Justice Kennedy, who was joined by Justice Scalia, framed the question in a different way and filed a "concurring in part and concurring in the judgment" opinion (Westside v. Mergens, 1990). Justice Marshall, who was joined by Justice Brennan, wrote separately on the constitutional issue but concurred in the judgment (Westside v. Mergens, 1990). Justice John Paul Stevens wrote the lone dissenting opinion in Mergens (Westside v. Mergens, 1990). The majority, plurality, and dissenting opinions are briefly characterized and commented upon in this section.

The majority portion of the Mergens decision begins by analyzing the statutory element present in the case (Westside v. Mergens, 1990). The first task of the Supreme Court was to define what Congress had not--"noncurriculum related." To begin that analysis, O'Conner looked to the language of the law (Westside v. Mergens, 1990). Then, using Webster's Third New International Dictionary and Black's Law Dictionary, O'Conner came up with the common meaning of the term "curriculum" (Westside v. Mergens, 1990): ". . . 'curriculum' is the whole body of courses offered by an educational institution or one of its branches." From this, the Court reasoned that "any sensible interpretation" of "noncurriculum" must be "anchored in the notion that such student groups are those that are not related to the curriculum" (Westside v. Mergens, 1990). As O'Conner points out, this definition is of small value because "the difficult question is the degree of 'unrelatedness to the curriculum' required for a group to be considered 'noncurriculum related'" (Westside v. Mergens, 1990).

For help in resolving this question, the Court turned to the Equal Access Act's definition of the term "meeting" (Westside v. Mergens, 1990). The Equal Access Act (1984) defines "meeting" as: "The term 'meeting' includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the curriculum." To the majority, use of the term "directly related" implies that student groups directly related to the subject matter are not "noncurriculum related" and must therefore be "curriculum related." The Court also used the "logic of the Act" for support of its definition (Westside v. Mergens, 1990):

> Because the purpose of granting equal access is to prohibit discrimination between religious and political clubs on one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or a political club is itself likely to be a noncurriculum-related student group. It follows, then, that a student group that is "curriculum-related" must at least have a more direct relationship to the curriculum than a religious or political club would have.

Absent from O'Conner's analysis is the third portion of the Equal Access Act's umbrella--"philosophical." It is hard to imagine a student group that would be "noncurriculum related" and outside the Act's proscriptions as she suggests.

The final portion of the Court's analysis and definition of "noncurriculum related" comes from the previously discussed legislative purpose, and in light of that legislative purpose the Court decided the best interpretation would be a broad one (Westside v. Mergens, 1990). From there, the majority laid down a test of five criteria for "noncurriculum relatedness" (Westside v. Mergens, 1990):

> In our view, a student group directly relates to a school's curriculum if the subject matter of the group is

> actually taught, or soon will be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

What was left, for the statutory part of the case, was applying these new principles to the club system at Westside--specifically the 10 clubs originally named by the students. After applying these principles, the Court found three of Westside's clubs to be "noncurriculum related" because they did not meet any of the five stipulations the Court had laid down for curriculum-related clubs (Westside v. Mergens, 1990). Subsurfers, Chess Club, and Peer Advocates were all found to be "noncurriculum-related" clubs leading the Court to its obvious conclusion (Westside v. Mergens, 1990): "Because Westside maintains a 'limited open forum' under the Act, it is prohibited from discriminating, based on the content of students' speech, against students who wish to meet on school premises during noninstructional time."

O'Conner's constitutional analysis begins and ends with the Supreme Court's prior holding in Widmar (Westside v. Mergens, 1990): "We think the logic of Widmar applies with equal force to the Equal Access Act." As the Eighth Circuit already held (Mergens v. Westside, 1989): "Any constitutional attack on the Equal Access Act must therefore be predicated on the difference between secondary school students and university students." A plurality in the Supreme Court, like the

Eighth Circuit Court, rejected this distinction (Westside v. Mergens, 1990):

> We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

For additional support, the Court turned to congressional fact finding and deferred to its coequal branch (Congress) and their "empirical determinations" about the maturity differences (Westside v. Mergens, 1990).

The rest of the plurality opinion analyzes how, just like in Widmar, a policy of equal access passes the Three-Prong Lemon Test and does not offend the Establishment Clause (Westside v. Mergens, 1990). The plurality ruled that the Equal Access Act does not offend the first prong of Lemon--it has a secular legislative purpose (Westside v. Mergens, 1990): "Congress' avowed purpose--to prevent discrimination against religious and other types of speech--is undeniably secular." The second prong of Lemon, that the governmental policy in question neither advance or inhibit religion, was the prong most vigorously contested by the School Board's attorneys (Petitioner's Briefs, 1989). Because the Equal Access Act expressly limits the involvement of school officials at meetings of student religious groups and provides that meetings must be held during "noninstructional time," the Act avoids the problems of "teachers as role models" and "mandatory attendance requirements" (Westside v. Mergens, 1990). The

Court admitted to a risk of "student peer pressure" under the guidelines of the Equal Access Act but rejected there was any risk of any "official state endorsement or coercion" (Westside v. Mergens, 1990). The third and final prong of Lemon, that the governmental action not foster an excessive entanglement with religion, was argued to be violated by Westside's requirement of a faculty sponsor (Petitioner's Briefs, 1989). To this, the Court merely pointed out that the Equal Access Act itself prohibited school sponsorship other than for "custodial" purposes and that "custodial supervision" does not "impermissibly entangle government in the day-to-day surveillance or administration of religious activities"--which would be a violation of the third prong of Lemon (Westside v. Mergens, 1990).

Justice Kennedy (with whom Justice Scalia joined) agreed with the results of O'Conner's constitutional analysis of the Equal Access Act, but disagreed with the way O'Conner achieved that result and wrote separately (Westside v. Mergens, 1990). According to Kennedy, in Establishment Clause cases the test should be one of government coercion rather than endorsement (Westside v. Mergens, 1990): "The second principle controlling the case before us, in my view, is that the government cannot coerce any student to participate in a religious activity. The Act is consistent with this standard as well." Justice Kennedy does not like the word endorsement because of its "insufficient content" and use of the word may result "in neutrality in name but hostility in fact when the question is the government's proper relation to those who express some religious preference" (Westside v. Mergens, 1990). As many as five current Justices have expressed displeasure with all or parts of the Lemon Test and Mergens marks another Establishment Clause case where Justices disagreed with it (Johnson, 1991).

In yet another separate opinion, Justice Marshall (with whom Justice Brennan joined) agreed with O'Conner's statutory construction of the Equal Access Act, but warned that the "low threshold for triggering equal access, however, raises serious Establishment Clause concerns" (Westside v. Mergens, 1990). He disagreed with the plurality's analysis of the differences between Widmar and Mergens and would not have relied as heavily on Widmar as the plurality did (Westside v. Mergens, 1990). Marshall is less concerned with the age or maturity distinctions and more concerned with forum differences between secondary schools and colleges (Westside v. Mergens, 1990):

> Thus the underlying differences between this case and Widmar is not that college and high school students have varying capacities to perceive the subtle differences between toleration and endorsement, but rather that the University of Missouri and Westside actually chose to define their respective missions in different ways. That high schools tend to emphasize student autonomy less than universities may suggest that high school administrators tend to perceive a difference in the maturity of secondary and university students. But the school's behavior, not the purported immaturity of high school students is dispositive.

Justice Marshall's opinion also warns that Westside should take additional steps to "fully disassociate" with the religious club to avoid advancement or entanglement problems (Westside v. Mergens, 1990).

The only dissenting opinion, written by Justice Stevens, focuses on the statutory construction employed by the majority (Westside v. Mergens, 1990). He disagreed with the majority's construction of "noncurriculum related" and the resulting test employed by the Court and predicted that the test "would produce nothing but hard cases" (Westside v. Mergens, 1990). He agreed with the majority that the intent of Congress in passing the Equal Access Act was to extend the principles of Widmar to high school students, but in extending those principles two basic questions needed to be answered (Westside v. Mergens, 1990):

1. Did the high school establish a free speech forum similar to the one at the university?
2. If they have, is the Equal Access Act constitutional?

Justice Stevens found major differences between the forum in existence at the University of Missouri at Kansas City where over 100 student groups were recognized and Westside's forum which he described as "no more controversial than a grilled cheese sandwich" (Westside v. Mergens, 1990).

His definition of "noncurriculum related," looking to the legislative history, would be much different than the majority's (Westside v. Mergens, 1990):

> An extracurricular student organization is "noncurriculum related" if it has as its purpose (or as part of its

> purpose) the advocacy of partisan theological, political, or ethical views. A school that admits at least one such club has apparently made the judgment that students are better off if the student community is permitted to, and perhaps even encouraged to, compete along ideological lines.

Under his definition of "noncurriculum related," all of Westside's clubs would be curriculum related because they represent an entirely different forum than was present in Widmar. Accordingly, Justice Stevens would find Westside to be beyond the proscriptions of the Equal Access Act (Westside v. Mergens, 1990).

Since, in his view, the Equal Access Act did not apply in the case the constitutional issue did not need to be reached, but Justice Stevens did comment on the pluralities Establishment Clause construction. At the heart of Justice Steven's constitutional complaints is the majority's construction of the Equal Access Act and resulting Establishment Clause problems (Westside v. Mergens, 1990): "The Act, as construed by the majority, comes perilously close to an outright command to allow organized prayer, and perhaps the kind of religious ceremonies involved in Widmar, on school premises." In addition, Justice Stevens raises the issue of local control over public schools (Westside v. Mergens, 1990):

> The Court's construction of this Act, however, leads to sweeping intrusion by the Federal Government into the operation of our public schools, and does so despite the absence of any indication that Congress intended to divest local school districts of their power to shape the educational environment. If a high school administration continues to believe that it is sound policy to exclude controversial groups, such as political clubs, the Ku Klux Klan, and perhaps gay rights advocacy groups, from

> its facilities, it now must also close its doors to traditional extracurricular activities that are noncontroversial but not directly related to any course being offered at the school.

As this chapter has previously pointed out, education is not mentioned or even referred to in the Constitution. Congress was able to pass the Equal Access Act through its expended power to tax. But was that the purpose of the Equal Access Act?

Implications and Reflections

The Mergens decision has been referred to by Education Daily as the most significant decision of the Supreme Court's 1989-90 term (cited in McCarthy, 1991). The Supreme Court's decision in Mergens was front page news in many newspapers around the country including the New York Times, Washington Post, Wall Street Journal, Los Angeles Times, Miami Herald, Philadelphia Inquirer, Baltimore Sun, U.S.A. Today, Kansas City Star, Des Moines Register, and the Omaha World Herald. Perhaps the most significant aspect of Mergens is that it sent a message that the era of strict neutrality rulings with regard to public schools (e.g., Edwards v. Aguillard, 1987) was over. In fact, there are those who believe that the Lemon Test era, the Court's standard Establishment Clause test for more than two decades, is also coming to an end (Johnson, 1991). Two members of the Court (Justices Kennedy and Scalia), who agreed with the plurality's decision, chose to write separately and apply a different test (a "coercion test").

The Mergens decision had political underpinnings. The Equal Access Act was characterized by some as victory for the New Religious Right and "the son of school prayer" (Wood, 1985). The New York Times portrayed the Mergens decision in a 1990 article the following way (Greenhouse, 1990):

> The case . . . was one of the more politically charged of the Court's term . . . The Equal Access Act was a long-sought goal of the religious right after the defeat of earlier efforts to bring prayer back into public school classrooms. The law was strongly supported in Congress by the Reagan administration and in the Supreme Court by the Bush administration. (p. A24)

At least in Mergens no one could accuse the Court of acting like a superlegislature--Congress had acted (The Equal Access Act) and the Court merely defined the Act and ruled on its constitutionality. This is not to say politics played no part in the Court's ruling; rather, the Court in Mergens abided by its separate function as the judiciary which the Constitution calls for. The "political seduction of the law" which former Supreme Court nominee Robert Bork (1991) commonly refers to, is not evident in Mergens.

One of the most common complaints about the Equal Access Act is that it opens school doors to undesirable groups--not necessarily religious groups--but groups that schools have traditionally avoided providing access to school facilities (Aron, 1985; Morris, 1990; Wood, 1985; Zakariya, 1985). This anxiety was heightened given the Court's broad construction of "noncurriculum-related" student groups in Mergens. However, while one can find a number of articles related to this fear (especially at the time of the Equal Access Act's passage), there is little evidence that the fear has ever manifested itself in a public secondary school. Public secondary school students are either unaware of the access they have if their school maintains a "limited open forum" or they do not care to engage in the types of groups which worried opponents of the Equal Access Act. Clearly, if a school has even one non-curriculum-related club they cannot deny access to a student-initiated chapter of the KKK or Skin Heads Club.

The Equal Access Act presents some school districts in Midwestern and Western states with another interesting dilemma (Morris, 1990). Several state constitutions around the country have more restrictive "Establishment Clauses" than the First Amendment restriction (Morris, 1990). For example, the constitution in the state of Washington contains the following clauses (Morris, 1990):

- "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."
- "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

School districts in Washington, and in other states with similar state constitutional provisions, are forced to forego federal funding, make their forums curriculum related consistent with the Supreme Court's criteria announced in Mergens, or allow access to school facilities consistent with the Equal Access Act. There can be little doubt that the Equal Access Act and the Supreme Court's construction of the Act eroded local autonomy in school districts across the country and created a conflict between federal law and state constitutional provisions.

Several professional education associations have denounced the decision in Mergens because of its retreat from the Court's more traditional "separation of church and state" rulings and the erosion of local control (McCarthey, 1991). What was once the undisputed domain of local educators was taken by the Federal Government with the passage of the Equal Access Act. While the Supreme Court traditionally defers to local school districts on matters relating to the curriculum and delicately treats the balance between federal and state control over education (Board of Education, Island Trees Union Free School District v. Pico, 1982), Congress with the Equal Access Act entered into new territory. The Court has decided, at times, to enter into educational decisions when the constitutional integrity of the public schools is threatened (e.g., West Virginia Board of Education v. Barnette, 1943). In the words of Justice Stevens' dissent, the Court's construction of the Equal Access Act leads to ". . . sweeping intrusion by the Federal Government into the operation of our public schools" (Westside v. Mergens, 1990).

The Supreme Court's ruling in Mergens also left some questions unanswered. It is a difficult task to reconcile the Court's decision in Hazlewood to the Mergens decision. In Hazlewood, the Court ruled that schools could censor student expression in school-related activities as long as it was related to "legitimate pedagogical concerns" and extended the public school's closed forum to a broad range of activities (Hazlewood v. Kuhlmeier, 1988). In fact, the Court ruled that a school activity becomes a "limited open forum" only if school authorities intentionally create such a forum (Hazlewood v. Kuhlmeier, 1988). The Court cited an earlier decision to support this conclusion (Cornelius v. N.A.A.C.P. Legal Defense and Education Fund, 1988): "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." This definition of "limited open forum" explicitly refers to intent as controlling in the finding of a "limited open forum." By 1990 and the Court's decision in Mergens, intent apparently is no longer a concern in finding a "limited open forum."

The Equal Access Act and the Supreme Court's decision in Mergens represent a constitutional crossroads. Students in public schools are guaranteed free speech and free exercise of religion and yet the same students are guaranteed that government will not establish a religion. Why this case is an appropriate vehicle to convey constitutional principles to public school students has previously been discussed. The history of the case presented in this chapter has attempted to bring out the issues that public school teachers wishing to teach about Westside v. Mergens may want to consider in their classes. Again, all of the issues upon which Mergens focuses may not "fit" the appropriate formula for every school or classroom. Still, many of them are hard to deny as appropriate in any public school classroom. Examples of possible teaching strategies that could be employed when teaching about Mergens are supplied in Chapter III. These examples are consistent with the research and history in Chapters I and II.

CHAPTER III

WESTSIDE COMMUNITY SCHOOLS V. MERGENS IN THE CLASSROOM AND BEYOND

Clearly, case studies, and Westside Community Schools v. Mergens (1990) in particular, are excellent ways to convey constitutional principles to public school students as shown in Chapters I and II. Still, the teacher, using case studies, is left with multiple ways of inculcating the issues and principles Mergens or any case study presents. Using a sound instructional approach will only add to an already proven vehicle--case studies. This chapter, Chapter III, concentrates on possible ways to teach about the Mergens case that are consistent with the research and history provided in Chapters I and II. These examples are just that--examples--and should not be mistaken as "inexorable commands" and possibilities should not be limited to what is presented in this chapter. The discussion and possible lesson plans that follow concentrate on proven instructional methods as well as current educational methodology.

As the research in Chapter I displayed, the American educational system is failing to teach, or students are failing to learn, about the most central document in American culture--The United States Constitution. Case studies have proven to be an effective method in transferring constitutional knowledge to public school students (Patrick, 1991). And, as detailed in Chapter II, Westside Community Schools v.

Mergens (1990) is an excellent example case for public school students everywhere. Mergens contains both statutory and constitutional principles, is a current case study, directly relates to student rights, and shows the federal system in action. Given the wide array of available case studies, Westside v. Mergens is the kind of case study both students and teachers will become excited about. The case shows students that they are not beyond the protection of either federal law or the Constitution just by their status as students. Or, framed in the wording of another famous case study, "It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate" (Tinker v. Des Moines Independent School District, 1969).

A Discussion of Mergens and Proven Methods

The following discussion of possible methods to use in connection with the Mergens case is intended to be used by social studies teachers in public secondary classrooms after the appropriate background and factual information has been provided to students. As that relates to Mergens, teachers would want to spend some time, or allow their students to spend some time, going over the history and facts of the case, the Equal Access Act, and relevant constitutional principles--as provided in Chapter II. This section concentrates on applying possible methods furnished in the last part of Chapter I and the first part of Chapter II to the

Mergens case. While the methods presented in this section have proven to be successful, their application to a potential case study will be beneficial to those teachers wishing to put the methods, and Mergens, into action in their classrooms.

Many teaching methods are appropriate when teaching about the Mergens case or almost any other subject--they are simply sound educational strategies. Cooperative learning is one of those methods (Lyman & Foyle, 1988). Cooperative learning can be applied to a variety of disciplines and teaching strategies. Often, it can be the "strategy within a strategy." The advantages of cooperative learning will not be restated here (see Chapter I). Most, if not all, of the following teaching strategies could be used in cooperative or individual settings. If there are advantages to cooperative learning (as argued in Chapter I) then it only makes sound educational sense to put those advantages to use while applying other innovative techniques and strategies. While the Mergens case may be taught individually, it should be taught cooperatively.

Case studies in general, and the Mergens case in particular, enhance students' critical thinking skills. Using Mergens, teachers could instill a wide variety of critical thinking skills. Teachers could ask their students to compare and contrast testimony of various witnesses. For example, how Dr. Findley's definition of curriculum was similar and dissimilar to the expert testimony and contrasting definition provided by Dr. Ward Sybouts. Or, students, working individually or in groups, could be asked to prioritize a list of arguments made by the attorneys for the students and the school. Students could analyze which line of argument was most important to each side. For example, was the definition of "noncurriculum related" more important to the students than the constitutionality of the Equal Access Act? Teachers may want to focus attention on the testimony of one witness and ask the students to analyze the testimony and decipher fact from opinion. In Mergens, the testimony of Dr. David Moshman could be used in enhancing this skill. Moshman testified, among other things, that secondary students were cognitively mature enough to distinguish between a religious toleration and religious advancement. Was this testimony fact or opinion? Obviously, the Mergens case could be used to teach a number of critical thinking skills--all Mergens needs is a teacher to facilitate those skills. Teachers using the case to teach critical thinking will want to delve deeper into student answers to find out why students responded the way they did.

Another innovative idea provided in Chapter I that could be used to convey various principles presented in Mergens is the use of a comparative study (Patrick, 1987; Ravitch, 1991; Reggio, 1990). While this strategy would require students being provided with additional background information from another country, students would benefit from the global perspective a comparative study offers. Teachers could choose almost any other country (providing students with relevant background information) and set up identical facts to the Mergens case and ask students to predict the outcome of a trial in the United States and in the example country. For example, students could be provided the various laws and constitutional framework present in Germany that relate to a case like Mergens and be allowed to predict how a German court would rule on the same set of facts. This strategy inherently includes critical thinking skills (predicting) and could obviously include cooperative learning as well.

Surely, the Mergens case, and case studies in general, lend themselves to the use of community resources. Examples of community resources that could be used in teaching Mergens include the following:

- lawyers
- judges
- law school professors
- law students
- educational psychologists
- education professors
- administrators from other schools

Any of these resources could be used to further student understanding and comprehension of the Mergens case. The effective use of community resources in teaching the Mergens case, as when using community resources in the educational setting any time, depends on adequate student and resource preparation (as described in Chapter I). When teaching Mergens, a local educational psychologist could be called upon to examine the testimony of Dr. David Moshman. Students could work in groups to develop questions centering on Moshman's testimony and the cognitive differences between secondary students and college students. The educational psychologist could be questioned by groups of students acting as attorneys for either the students or the school. Certainly, when using this strategy teachers are limited to the resources available in their community.

Not only does the Mergens case lend itself to the use of community resources, it also lends itself to the possible use of primary documents. Of course, certain primary documents are almost essential to teach about the case. For example, a copy of the federal statute which was involved in the case, the Equal Access Act, and the Constitution of the United States--particularly the First Amendment. Other primary documents that could be used by teachers include:

- the legislative history of the Equal Access Act,
- the Supreme Court opinion in Mergens and other relevant cases,
- appellate Court decisions dealing with "equal access,"
- important testimony from the District Court Trial,
- Westside High School Board Policy 5610,
- description of the club system present at Westside High School in 1985, or

- petitioner's and respondent's briefs made to the Supreme Court.

Students, armed with the appropriate background information, could use these primary resources in making reasoned judgments about the arguments presented, the testimony of witnesses, the opinion of various judges, and about the case itself. Interpretation of the various primary sources available in Mergens allows students to make decisions based on the same primary sources the Supreme Court used in deciding the case.

An additional method at teachers' disposal if Mergens or case studies were chosen to represent constitutional principles is the strategy of concept mapping (Wease, 1986). After thoroughly studying the background and the case, students could be asked (cooperatively or individually) to form concept maps of the Mergens case. The Mergens case could be represented by students in a number of different concept maps. The advantages to this visual representation of the complex ideas existing in Mergens allows the students to externalize the conflicting relationships in the case. One example of a possible concept map for Westside Community schools v. Mergens is provided in Figure 2.

Other teaching strategies not mentioned in Chapter I or II have been applied successfully to other disciplines and could be used in teaching case studies or Mergens. Among these strategies are use of opinion polls/surveys and integrating the study of Mergens with other disciplines. Either

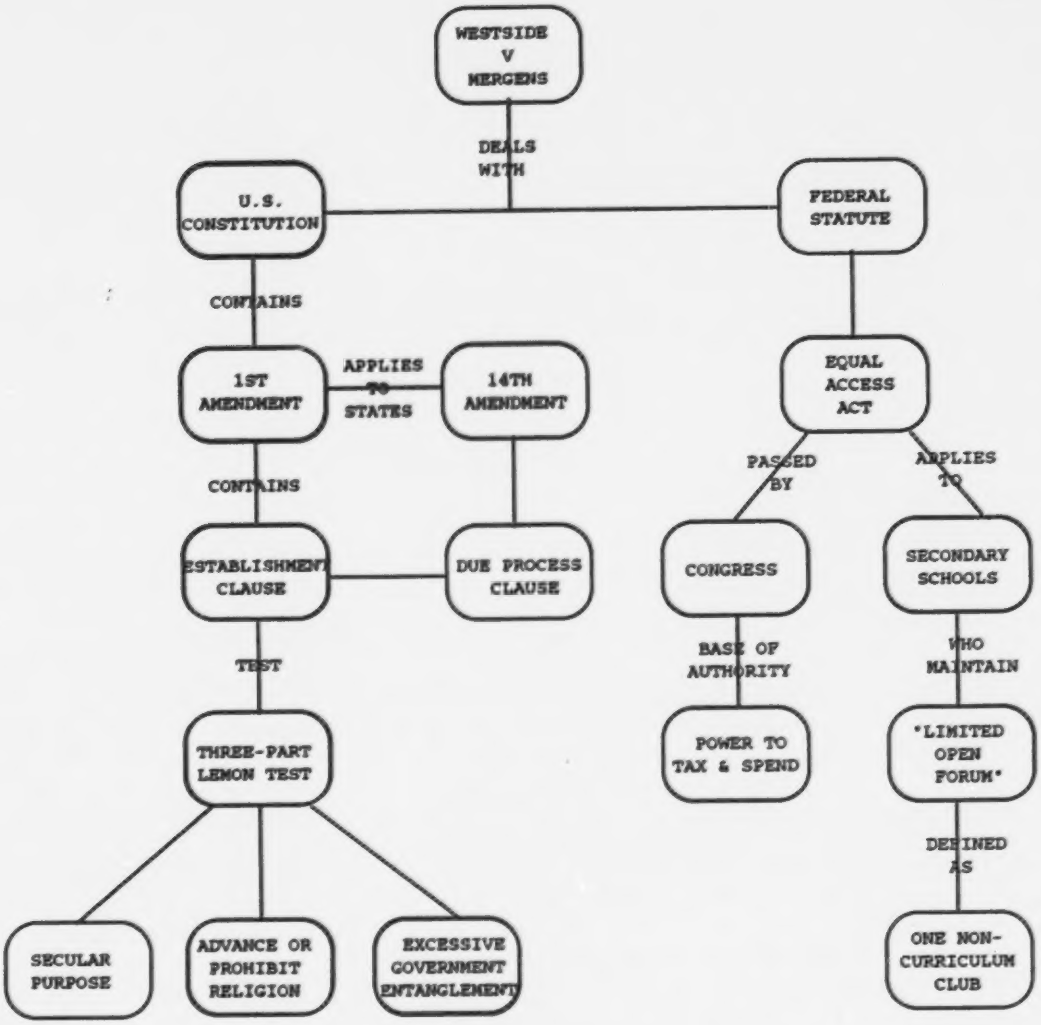
WESTSIDE V MERGENS
DEALS WITH
U.S. CONSTITUTION
FEDERAL STATUTE
CONTAINS
1ST AMENDMENT
APPLIES TO STATES
14TH AMENDMENT
EQUAL ACCESS ACT
CONTAINS
ESTABLISHMENT CLAUSE
DUE PROCESS CLAUSE
PASSED BY
APPLIES TO
CONGRESS
SECONDARY SCHOOLS
TEST
BASE OF AUTHORITY
WHO MAINTAIN
THREE-PART LEMON TEST
POWER TO TAX & SPEND
"LIMITED OPEN FORUM"
DEFINED AS
SECULAR PURPOSE
ADVANCE OR PROHIBIT RELIGION
EXCESSIVE GOVERNMENT ENTANGLEMENT
ONE NON-CURRICULUM CLUB

Figure 2. Concept map of Westside Community Schools v. Mergens (1990).

of these strategies could be used to further student understanding and comprehension of the statutory and constitutional principles in Mergens. Successful teaching methods should be shared and applied among disciplines. While no direct evidence exists that these strategies are effective in teaching about case studies, their successful implementation in other areas make them prime candidates in teaching Mergens. Moreover, Mergens presents the kinds of issues that make these strategies particularly appealing. The following paragraphs attempt to show how these strategies could be used when teaching about the Mergens case.

Students' active involvement in the writing and conducting of opinion polls helps bring issues "closer to home" and is a proven instructional method (Smith, 1981). In other words, students can find out how students, teachers, parents, and administrators feel about relevant issues and topics. Since the issues in Mergens relate directly to secondary schools, students, teachers, parents, and administrators, the case is an excellent candidate for an opinion poll. Students studying about the Mergens case could poll other students to find out student perceptions about a religious club in their school--to see if students could, in fact, distinguish between religious toleration and religious advancement. Since these perceptions were a significant part of the Mergens decision, students could compare the results of their study to the decision of the Supreme Court. Or, a poll could be taken to find out parental attitudes or knowledge of the Equal Access Act. Parents could be asked of their knowledge of the Equal Access Act and asked their opinion of the Act in different situations. For example:

1. How would you feel about a student-initiated Ku Klux Klan Club meeting after school and using school facilities?
2. Should students wishing to form a religious club be allowed to use school facilities before or after school to meet and pray?

Obviously, the possibilities for using opinion polls in harmony with the Mergens case are many. Students and teachers are only bound by their imaginations and relevancy to the Mergens case.

Another proven technique in increasing student performance and learning is curriculum integration or interdisciplinary teaching. Many studies indicate that interdisciplinary approaches to the curriculum yield at least as good of results, if not better, as standard courses (Vars, 1978). Life is not as segregated as specific courses or the school day, and interdisciplinary approaches allow students to recognize the natural transfer among specific subjects. The Mergens case could be integrated with a math class. For example, students could graph various components of the Mergens case:

- The frequency, by year, which the Supreme Court has applied the Establishment Clause to the states.
- The frequency, by year, which the Supreme Court has ruled on Establishment Clause claims in the public schools.
- The percentage, since 1971, of time the Court has used the Lemon Test against Establishment Clause claims.
- The results of an opinion poll or survey conducted in the school.
- The statistical significance of results from an opinion poll or survey.
- The comparisons between clubs in their school and the clubs which existed at Westside.

Many other components of the case could be graphed or represented in a mathematical way. Also, students could search for ways in which math was used in the Supreme Court decision or in the passing of the Equal Access Act.

Certainly, Mergens could be taught in conjunction with other subjects as well. An English unit could be integrated with the Mergens case study. Definitions and the English language were important parts of the Mergens case--as they are in most legal disputes. Students could study the explicit and implicit meanings in the Supreme Court decisions leading up to Mergens. Or, they could attempt to form their own definition of "curriculum" based on other readings. Students who were studying the proper form for essay writing in English could transfer that knowledge to an analysis of the "essays" written by the three federal courts who rendered a decision in Mergens. Still another integrating idea would be for students, after studying various writing techniques and styles and the Mergens case, to choose one of those styles and write their own opinion of the Mergens case consistent with what they have learned about writing and the Constitution. Other interdisciplinary strategies could be used when teaching about Mergens. Creative teachers working together could plan a number of powerful integrated lessons.

Lesson Plans To Insure Success:
The Use of Role Playing and Mock Trials
When Teaching Westside Community Schools v. Mergens

In addition to the various strategies already described in the previous section, still other methods offer solid approaches to aid in raising the scores on "America's Civics Report Card." This section contributes two example lesson plans that could be used by teachers who choose Mergens as a means to convey constitutional principles and knowledge. The first lesson plan employs a proven method--role playing--and relates that to the Mergens case. Role playing and simulations provide an opportunity for students to become actively involved in the material which they are studying. They may, for a class period, "become" the characters which they are studying--which is fun experience for the teacher and the learner. The second lesson plan engages a specific type of simulation designed and tailored for case studies--a mock trial. Both methods stress active participation by students and have similar positive benefits. Again, these methods and lesson plans assume students have received appropriate factual and historical background of the Mergens case prior to their implementation--as brought out in Chapter II.

Role playing activities, when properly used, increase student interest and may teach students specific skills that could be transferred to other situations (Glenn, Gregg, & Tipple, 1982). Role playing has been shown to have a positive effect on students' problem-solving ability--when students are adequately prepared for the simulation (Glenn et al., 1982). In addition, role playing, when carefully implemented, has been proposed as a way to aid handicapped students in mainstreaming to "regular" classrooms (Bender, 1985). Teachers using role-playing techniques will find more student success if a few basic principles are followed (Glenn et al., 1982):

- Clearly identify the objectives or outcomes of the role-playing activity before the activity begins.
- Provide practice opportunities for students before the activity begins.
- Give students additional feedback during the activity.
- Provide students with an opportunity to debrief after the activity is over.

Following these guidelines, students can learn to appreciate that the bureaucratic engine that runs America's legal and political machinery is really composed of people. Students then can begin to analyze where and why the American system of government fails and succeeds.

Mock trials, a specific kind of role-playing activity tailored to case studies, deliver additional benefits to students beyond the many general benefits of role playing. One author, Richard Roe (1987), devised a list of benefits that will be enjoyed by students whose teachers decide to use mock trials in their classes:

- Students gain a basic understanding of the legal mechanism through which society chooses to resolve many of its disputes.
- Students critically analyze problems and strategically think.
- Students gain questioning, listening, and oral presentation skills.
- Students' extemporaneous speaking and organization skills improve when using mock trials.
- Working cooperatively, mock trials improve students' attitudes toward school and each other.

These skills and attitudes are all furthered by a mock trial activity conducted by students who are adequately prepared to simulate the real life drama associated with trials. Mock trials are a way of bringing the material to life. What student would not want to "become" an attorney, judge, or other courtroom actor for a class period? L.A. Law has been a popular television show for many seasons and part of its success must rely on America's insatiable fascination with courtrooms and the law. Public school students are the products of the society which made that show successful.

In addition to these benefits, mock trials are a natural opportunity for teachers to use other proven strategies, which have been discussed throughout this thesis, simultaneously. Students (who live near real courtrooms) could take field trips to courtrooms and learn how actual trials are conducted every day. It may even be possible for the students to have a short question and answer session with a judge who is not in session or other courtroom actors (e.g., bailiff, courtroom reporter, or attorney). Another possible use of community resources would be to bring the resources into the school to help conduct a mock trial. An actual judge could preside over a student simulated mock trial, or attorneys could help students prepare their arguments. Again, students and the community resource person must be adequately prepared to ensure a quality learning experience.

The use of community resources is not the only strategy which naturally connects with mock trials. A popular and important skill that has received considerable attention in this thesis and in many educational periodicals (e.g., The Social Studies, Phi Delta Kappan) also links easily with role playing and mock trials. In mock trials, juries (or judges) are asked to render verdicts based on laws and evidence presented at the mock trial. Teachers may want to have their judges or juries explain their decisions based on the laws and the evidence. This engages students in the critical thinking processes which were described in Chapter II. In civil cases, where witnesses are not called and the number of courtroom actors is limited, teachers could split those students not acting as attorneys, judges, or some other courtroom character into small groups of judges who must decide the case. This would involve even more students in the critical thinking process.

This is not to say that students assigned to other roles in the mock trial are not engaged in critical thinking. Students acting as attorneys must be able to analyze relevant and irrelevant information and sort out fact from opinion. They must also, to be an effective attorney, make generalizations and predictions about arguments that will likely be brought out from their counterparts. Even a student assigned to the position of bailiff (if the teacher desires to assign one) must also use critical thinking skills in keeping peace in the courtroom. A good bailiff must have keen perceiving skills and constantly observe the courtroom to insure a peaceful setting. Further, when a conflict does present itself in the courtroom, the bailiff must use good decision-making skills in resolving the conflict.

Finally, mock trials are group activities and as such they naturally receive the benefits of cooperative learning.

Students must work well together in order to have a successful mock trial. Minor, and sometimes major, conflicts will periodically arise in the student planning process and students must be able to solve those problems in a cooperative manner. During a mock trial students can watch other students "become" characters which they have been studying about. In that process students will be modeling effective thinking and learning skills for other students. The many other general benefits associated with cooperative learning have previously been discussed in Chapter I.

With the aforementioned benefits in mind, two lesson plans are presented--"I'm Sorry Bridget" and "496 US 226: The Supreme Court Case of Westside Community Schools v. Mergens." The first plan, "I'm Sorry Bridget," takes advantage of the benefits of role playing various aspects of the factual background leading up to the legal conflict. This lesson could be an approach/motivational activity or could be included after a discussion of student constitutional rights. The second lesson plan, "496 US 226: The Supreme Court Case of Westside Community Schools v. Mergens," focuses on a mock trial that could culminate student learning and bring closure to an entire Mergens unit.

Role Playing, Mock Trials, and Mergens

"I'm Sorry Bridget"

Abstract. This lesson takes advantage of the benefits of role playing and simulations while teaching students important factual background of a significant and recent Supreme Court case that deals directly with secondary students--Westside Community Schools v. Mergens (1990). In the lesson, students actively participate in "becoming" the characters which were involved in the Mergens case and act out the conflicts which led to a legal battle culminating in Supreme Court resolution. The overall objective for the lesson is to increase student excitement and awareness about the case as well as provide students with important factual and historical background that could be used by students at a later date to reach their own reasoned decisions and conclusions.

Rationale. Role playing provides students with unique opportunities to not only visualize but "become" the characters they are studying about. By simulating important scenes of the Mergens case, before it went to trial, students gain a first-hand awareness and appreciation for the attitudes and feelings of the important characters connected to the case. The Mergens case is particularly appealing to secondary teachers as a vehicle to represent constitutional ideas and principles because it applies directly to secondary students and their constitutional and statutory rights. Both case studies and role playing are proven instructional methods that enable students to work in cooperative settings and achieve higher levels of cognition. This lesson is designed to "set the stage" for the Mergens case and not designed to conclude student learning about the case.

Goals and Objectives

Cognitive. As a result of this lesson, students will:

- identify the major characters associated with Westside Community Schools v. Mergens,
- demonstrate mastery and understanding of a situation relevant to the Mergens case by learning a role and acting out their assigned part before an audience,
- observe other students role playing significant aspects of the Mergens case and empathize with other characters and their feelings and attitudes,
- understand the conflicts and factual background which led Bridget Mergens and other Westside students to the federal court system for resolution,
- apply the factual background of the Mergens case to new situations and learning experiences.

Affective. As a result of this lesson, students will:

- Appreciate the attitudes, feelings, and behaviors of all major characters associated with the Mergens case before it went to trial.

Critical Thinking Skills and Taxonomy Level

Students will be engaged in the enabling skill of observing--watching other students perform background information of the Mergens case. Again, this lesson is designed to enable students to perform higher levels of cognition and thinking in future classes that relate to the Mergens case. On Bloom's (1956) Taxonomy, this lesson will primarily consist of comprehension activities.

Materials Needed

Students will need copies of their assigned situation and notebooks to record others situations. Optional materials may include props and costumes for a more precise portrayal of actual events.

Teaching Strategy

Orientational/motivational set. Ask students to think of a situation at school (or, if they cannot, a situation at home) where they were not allowed to do something they really believed they should be able to do. Then ask them to remember how they resolved the conflict and get together with a partner and share those experiences.

Specific procedures. Break students into heterogeneous and racially mixed groups and assign each group a situation related to the events which led to the Mergens trial (see Appendix D). Each group member will be responsible for learning a short part in the assigned situation and helping others in their group learn their roles as well. After the groups have learned their roles, they will perform their situations in front of the class while the rest of the class carefully observes and record the events, feelings, and emotions of those characters involved. If time permits, have students trade observation notes with another student and compare/contrast each other's observations of the different situations. Then have the students explain to their partners the observations they did make--why were some things included and others not?

Closure. After the role playing, recording, and analysis are finished ask students to, either through writing or orally, tell the "stories" they have witnessed or acted out in class. Finally, if time permits, ask students to pick out one major character and infer what their next contribution to the story will be (this too could be accomplished through a short paragraph or orally).

Evaluation. While some formal method could be employed, the teacher, through closure, will be able to ascertain whether or not the goals and objectives for the class have been met.

Follow-up activities. A deeper immersion into the constitutional and statutory framework and principles that make up Westside Community Schools v. Mergens.

"496 US 226: The Supreme Court Case of Westside Community Schools v. Mergens"

Abstract. This 4-day lesson is designed as a culminating activity to a unit or groups of lessons centering on the First Amendment and Federal Law. The simulation focuses on the facts presented in a 1990 Supreme Court ruling--Westside Community Schools v. Mergens. Students are asked to simulate a civil case in an appellate court (Supreme Court) by conducting a specific type of simulation--a mock trial. In the lesson, students are assigned to the limited roles a civil case offers, while remaining students are assigned to act as Supreme Court Justices. The Justices will be divided into courts of three, each court deciding the case independently based on the evidence presented during the trial and the laws which the case involves. Ultimately, the Supreme Courts will deliberate and each render an opinion explaining their decision based on law and evidence.

Rationale. Mock trials are a type of student simulation suited especially for case studies. Students benefit from being involved in the high drama of a mock trial simulation. A mock trial experience improves students' listening, questioning, and oral communication skills as well as their ability to strategically organize and manipulate information. While students are engaged in these skills they will be learning important and fascinating aspects of the legal system and courtroom procedures. The lesson is designed to enable students to bring the Mergens case, and the issues it presents, to life through a specific form of role play. This mock trial centers on the Supreme Court case of Westside Community Schools v. Mergens (1990)--which highlights both statutory and constitutional principles that relate directly to secondary students and their rights. Since this lesson is a mock appellate court trial, rules and procedures normally associated with testimony, questioning, and witnesses are simplified since no witnesses can be called.

Goals and Objectives

Cognitive. As a result of this lesson, students will:

- demonstrate mastery of constitutional and legal principles through their application in a mock trial,
- exhibit proficiency in appellate court procedures by conducting a mock trial according to rules presented,
- devise legal arguments to persuade "mock justices" that the evidence and the law favors an affirmative ruling for their side,
- display higher order thinking skills by applying federal law and the United States Constitution to evidence and facts,
- write legal opinions based on their knowledge and comprehension of federal law, the United States Constitution, and evidence.

Affective. As a result of this lesson, students will appreciate:

- that laws and the United States Constitution are not precisely written to apply to every situation and many leave room for judicial interpretation,
- that as public school students they have rights guaranteed by the Constitution and Federal Law.

Critical Thinking Skills and Taxonomy Level

A mock trial forces students to perform a variety of critical thinking skills. Students role playing attorneys will predominantly be focused on the processes of analyzing relevant/irrelevant information and fact/opinion information as well as predicting arguments from their counterparts. Students acting as judges will ultimately be drawn to the operation of making judgments based on the laws and evidence presented. This operation requires logical reasoning abilities--both inductive and deductive. This lesson is predominantly at the application level on Bloom's (1956) Taxonomy--students will be applying their knowledge of federal law and the Constitution to evidence and facts. Although, students will demonstrate higher levels on the taxonomy when rendering an opinion.

Materials Needed

All students will need copies of the United States Constitution (available from: Commission on the Bicentennial of the United States Constitution, 808 17th St. NW, Washington, DC 20006), the Equal Access Act (see Appendix A), the club system at Westside High School (see Appendix B), School Board Policy 5610 (see Appendix C), and the facts of the case (see Appendix E). Optional materials include props, costumes, Legislative History of the Equal Access Act, District and Eighth Circuit Court Opinions, District Court Record, club system, and Amicus Curiae Briefs filled to the Supreme Court.

Teaching Strategy

Orientational/motivational set. Ask students to think, based on their knowledge of the Constitution and the Equal Access Act, of possible student clubs which would fall under the proscriptions of the Equal Access Act, but still may be unconstitutional. Have students share some of those potential "close calls" with the rest of the class.

Specific procedures--Day 1. Pass out to students "Facts of the Mergens Case" (see Appendix E) and allow them some time reading over the facts which correspond to the Mergens case. Split students into groups of three. The groups will be assigned to one of three roles (see Appendix F)--respondents' (students') attorneys, petitioner's (school's) attorneys, or Supreme Court panel. Allow students the rest of the class to work on their assigned roles and explain that the trial will be held the next class period. The teacher should monitor group progress to see if more time is needed.

Day 2. Students should set up the classroom to facilitate the trial (e.g., semicircle of judges facing two separate groups of attorneys). Explain to the students that the attorneys will have 20 minutes each to make their case before the Courts and that the Justices are allowed to interrupt their arguments at any time with a question relevant to the case. The rest of the class period can be used by the Justices to discuss their ruling while the attorneys discuss possible statements to the press depending on the Courts' decision. The three-member courts are allowed to write a majority opinion, plurality opinion, or an individual judge could write a dissenting opinion.

Day 3. The Justices will finish writing their opinions, while the attorneys finish their "statements for the press"--attorneys will need to prepare both a winning and a losing statement. Remind students that their individual values and beliefs should not be a part of their decisions. That their decision should be based on the law, the Constitution, and arguments presented.

Day 4. Justices will read their majority, plurality, and dissenting opinions to the class and attorneys will read their "statements to the press."

Closure. After students are finished with their opinions and statements to the press, ask them to, written or orally, explain the three most important lessons they have learned as a result of the mock trial activity. Ask them to reconsider the Constitution and the First Amendment in light of their mock trial. Have their opinions changed or did they stay relatively consistent?

Evaluation. Students evaluate each other on the basis of established criteria for group work (e.g., effort, performance, contribution, cooperation). In addition, the teacher will determine whether or not groups have successfully completed the goals and objectives of the lesson through group performance during the lesson and assign either a grade of complete or incomplete based on their performance. Groups with incompletes will be required to continue working on their assignment until the objectives have been met.

Follow-up activities. Students will compare their arguments and decisions to the actual arguments and decisions made before and by the Supreme Court.

Thoughts, Reflections, and Suggestions

More than 200 years have passed since the United States Constitution was ratified and became the "supreme law of the land." Since then, the Constitution has changed--through amendment and practice--to what it means today. While the men who framed the document did not mention public education, they realized its importance to a government that could endure the "test of time" (Madison, August 4, 1822; cited in Patrick, 1991). The Constitution has withstood the "test of time" in spite of, not because of, an uninformed electorate. One can only wonder what the reactions of James Madison, Alexander Hamilton, George Washington, or Benjamin Franklin would be if they knew of the majority of Americans' ignorance and apathy toward the Constitution. The American educational system is failing to educate its citizens about even the most basic constitutional principles--so much so, one historian described the last 40 years of constitutional education in America as a "persistent pattern of ignorance" (Kammen, 1986). How much longer the Constitution, or the society which lives by it, can last in an environment characterized apathetic, ignorant, and uninformed citizens is a question left to fate or to the public educators charged with rectifying a dismal situation.

The problems associated with constitutional instruction and learning are not new. The Constitution is not ignored in school districts across the United States, and continues to appear in curriculum guides throughout the United States (Patrick, 1987). However, that does not mean students are leaving their public educational experiences filled with constitutional knowledge and excitement. The most widely used American history texts on which teachers have become so dependent serve the undistinguished function of transforming a truly powerful and exciting subject into unimaginative blandness (Patrick, 1987; Remy, 1987). Teachers are exiting their teacher preparation programs unable to provide examples of basic constitutional principles or describe them in anything beyond basic terms (Hyland, 1985). What's more, teachers still rely on archaic methods such as rote memorization in classroom environments that do not resemble the constitutional values which they are trying to convey (Hyland, 1985; NEAP, 1990).

Teachers charged with the task of conveying constitutional principles to secondary students face a difficult and challenging task. But that is truly the thrill of teaching. The excitement of teaching is being able to do what so few can do well--educate students in the face of obstacles and hardship. Teachers are professionals who should be able to succeed where their predecessors failed. In terms of constitutional education and instruction this will require teachers to model democratic values, use primary resources, visualize the constitution from a global perspective, use available community resources and technology, and focus on the vehicles which collectively make up what the Constitution means--case studies. Armed with these tools and resources, the American educational system will begin to improve America's constitutional knowledge and insure against James Madison's (August 4, 1822; cited in Patrick, 1991) gloomy predictions of "tragedy."

While case studies are a proven educational approach when teaching about the Constitution, teachers must choose the best case studies among the hundreds available to represent the Constitution and its principles. The example case study presented in this thesis, Westside Community Schools v. Mergens (1990), relates directly to secondary students, their statutory and constitutional rights, is a recent case, and is an excellent case for constitutional educators to use. The

Mergens case pertains to students' First Amendment rights and a recent federal statute--the Equal Access Act. The Mergens case shows students that the Constitution, federal law, and case law are not written to apply to every situation and must be interpreted by the judiciary. Mergens shows students that they do have rights which are guaranteed in both federal law and the Constitution. If properly taught, Mergens should stimulate students to find out more civic and constitutional information that pertains to them.

Of course, case studies, purely by their use, do not assure student success and should be used in conjunction with other proven methods. The benefits of using cooperative learning, critical thinking, primary and community resources, opinion polls and surveys, and interdisciplinary strategies should not be overlooked by teachers who choose case studies to pass on constitutional information to their students. Clearly, role playing various factual aspects of the conflict on which the case study centers, or the trial itself, actively involves students in their learning, forces students to critically analyze problems, strategically think, and improves their questioning, listening, and oral presentation skills. The benefits of students using case studies to learn about the United States Constitution will only be magnified by inventive teachers who incorporate other excellent methods with the Mergens case or any case study.

United States citizens have been living in a constitutional republic for more than 200 years. The Constitution sets out the basic framework of their government and establishes certain rights which government cannot infringe upon. Every day, people living in the United States are affected by words written more than 200 years ago. Americans know that the Constitution exists--they just know very little about it. This ignorance is a problem waiting to happen. It is only a matter of time before American constitutional apathy translates into bigger problems. In terms of constitutional education, the future may be brighter than the recent past. The American education system approaches the year 2000 knowing that problems exist in constitutional education which must be corrected and that the possibilities for future improvement are exciting. While the system of government which the Constitution created has lasted over 200 years with an uninformed electorate, it is the responsibility of American educators to insure the next 200 are characterized much differently.

REFERENCES

Abbington School District v. Schempp, 374 U.S. 203 (1963).

Aron, M. P. (1985). The Equal Access Act: A haven for high school "hate groups"? Hofstra Law Review, 13(Spring), 589-614.

Baron, M. A., & Bishop, H. L. (1991). Come one, come all. American School Board Journal, 178(3), 29-30.

Bauer, J. R. (1991). The political thought of the framers: Ambiguities and interpretations. Perspective on Political Science, 20(1), 11-16.

Bender, W. N. (1985). Strategies for helping the mainstreamed student in secondary social studies classes. The Social Studies, 76(6), 269-271.

Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir. 1984).

Beyer, B. K. (1985). Critical thinking. Social Education, 49(4), 270-277.

Bloom, B. S. (Ed.). (1956). Taxonomy of educational objectives: The classification of educational goals. Handbook 1. Cognitive domains. New York: McKay.

Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982).

Bonham, K. (1989, March 3). Appeal of Bible Club case. The Lance, p. 1.

Bork, R. H. (1990). The tempting of America. New York: Simon & Schuster.

Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980).

Brief for the Petitioner, Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1989).

Brief for the Respondent, Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1989).

Butts, R. F. (1981). Society's expectation for school instruction. Teaching about the Constitution in American secondary schools. Washington, DC: American Historical Association and the American Political Science Association.

Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980).

Clark v. Dallas Independent School District, 671 F.Supp. 1119 (N.D. Tex. 1987).

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

Cornelius v. N.A.A.C.P. Legal Defense and Education Fund, 473 U.S. 788 (1988).

Crary, R., & Evans, H. (1952). The citizen as a problem solver. Education for Democratic Citizenship: Twenty-second Yearbook of the National Council for the Social Studies. Washington, DC: National Council for the Social Studies.

District Court Record Mergens v. Westside, CV No. 85-0-426 (1987).

Edwards v. Aguillard, 482 U.S. 168 (1987).

Engel v. Vitale, 370 U.S. 421 (1962).

Equal Access Act, 20 U.S.C. §§4071-74 (1984).

Everson v. Board of Education, 330 U.S. 1 (1947).

Gallagher, A. F., & Robinson, D. (1989). Passing the torch: A model school-community project [Machine-readable data file]. Washington, DC: Office of Educational Research and Development (Producer and Distributor).

Garnett v. Renton School District, 675 F.Supp. 1268 (W.D. Wash. 1989).

Glenn, A. D. (1990). Democracy and technology. The Social Studies, 81, 215-217.

Glenn, A. D., Gregg, D., & Tipple, B. (1982). Using role play activities to teach problem solving. Simulation & Games, 13(2), 199-209.

Gold, J. A. (1990). Democracy. Update on Law-Related Education, 20(1), 11-16.

Goldsmith, K. (1990). The Equal Access Act: The Supreme Court upholds its constitutionality. School Law Bulletin, 21(4), 9-15.

Grand Rapids School District v. Ball, 473 U.S. 373 (1985).

Greenhouse, L. (1990, June 5). High court rules religious clubs can meet in public high schools. New York Times, pp. 1, A24.

Hazlewood v. Kuhlmeier, 484 U.S. 260 (1988).

Hearst Report. (1987). The American public's knowledge of the U.S. Constitution: A national survey of public awareness and personal opinion. New York: The Hearst Corporation.

Hyland, J. T. (1985). Teaching about the Constitution: Relationships between teachers' subject matter knowledge, pedagogic beliefs and instructional decision making regarding selection of content, materials, and activities [Machine-readable data file]. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Producer and Distributor).

Ivey, J. (1985, March 5). District 66 rejects Bible session. Omaha World Herald, p. 14.

Johnson, T. P. (1991). Lee v. Weisman: "The Tenth Justice" takes aim on the Lemon Test. Wests Education Law Reporter, 67(4), 1021-1030.

Judge denies order in meeting request. (1985, May 29). Lincoln Star.

Judge won't tell school to OK religious meet. (1985, May 30). Lincoln Journal.

Kammen, M. (1986). A machine that would go of itself: The Constitution in American culture. New York: Alfred A. Knopf.

Kelly, T. E. (1989). Leading class discussions of controversial issues. Social Education, 53(10), 368-370.

Legislative History of the Equal Access Act, 20 U.S.C. §§4071-74 (1984) 130 Congressional Record: House and Senate Reports.

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982).

Lyman, L. K., & Foyle, H. C. (1988). Cooperative learning: Experiencing the Constitution in action [Machine-readable data file]. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Producer and Distributor).

Lynch v. Donnelly, 465 U.S. 668 (1984).

Marsh v. Chambers, 463 U.S. 783 (1983).

McCarthy, M. M. (1991). Student religious expression: Mixed messages from the Supreme Court. Wests Education Law Reporter, 64(1), 1-13.

McCollum v. Board of Education, 333 U.S. 203 (1948).

McEwan, B. (1990). Judicious discipline: Citizenship values as a framework for moral education [Machine-readable data file]. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Producer and Distributor).

McPhie, W. E. (1988). Teaching American democracy in American public schools. Social Education, 52, 152.

Mergens v. Westside Community Schools, CV No. 85-0-426 LEXIS 17487 (D.Neb. 1988).

Mergens v. Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989).

Meyer, J. R. (1990). Democratic values and their development. The Social Studies, 81, 197-201.

Morris, A. A. (1990). The Equal Access Act after Mergens. Wests Education Law Reporter, 61(4), 1139-1165.

Moshman, D. (1988). Children, education, and the First Amendment: A psychological analysis. Lincoln: University of Nebraska Press.

Mueller, J. W., & Schamel, W. B. (1988). Teaching the Constitution from primary sources. Momentum, 19(3), 15-18, 60-61.

National Assessment of Educational Progress. (1988). The civics report card. Princeton, NJ: Educational Testing Service.

National Assessment of Educational Progress. (1990). The civics report card. Princeton, NJ: Educational Testing Service.

Novak, J. D., & Gowin, B. D. (1984). Learning How to Learn. Cambridge: Cambridge University Press.

Patrick, J. J. (1987). Teaching and learning about the Constitution in secondary school courses on American history: Persistent problems and promising practices [Machine-readable data file]. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Producer and Distributor).

Patrick, J. J. (1988a). Teaching the Bill of Rights [Machine-readable data file]. Washington, DC: Office of Educational Research and Improvement (Producer). Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Distributor).

Patrick, J. J. (1988b). Teaching The Federalist papers [Machine-readable data file]. Washington, DC: Department of Education (Producer). Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Distributor).

Patrick, J. J. (1988c). The U.S. Constitution in today's world [Machine-readable data file]. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Producer and Distributor).

Patrick, J. J. (1991). Rights and liberties at risk. Update on Law-Related Education, 15(1), 3-5, 44-45.

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

Ravitch, D. (1991). A report from Eastern Europe. The Social Studies, 82(2), 49-55.

Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Michigan 1965).

Reggio, M. H. (1990). The U.S.S.R.: A democratic constitutional government? Update on Law-Related Education, 14(3), 19-21.

Remy, R. C. (1987). The Constitution in citizen education. Social Education, 51, 331-336.

Repa, B. K. (1990). On the inside looking in. Social Education, 54, 336.

Robinson, S. B. (1984). Teaching about the United States Constitution [Machine-readable data file]. Washington, DC: National Institute of Education (Producer). Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Distributor).

Roe, R. L. (1987). Putting on mock trials. [Machine-readable data file]. Washington, DC: Department of Education (Producer). Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Distributor).

Scriven, M. (1976). Reasoning. New York: McGraw-Hill Book Co.

Sendor, B. (1984). Equal Access: Courts and Congress disagree. American School Board Journal, 171(11), 7, 48.

Smith, A. R. (1988). A teacher reflects on the "living Constitution." Momentum, 27(1), 31-39.

Smith, M. R. (1981). Teacher resource manual for civics [Machine-readable data file]. New Mexico Department of Education (Producer). Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Distributor).

Steinike, K. (1985, October 4). United States v. Westside High. The Lance, p. 1.

The American Heritage Dictionary of the English Language. (1971). New York: Houghton Mifflin.

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

Turner, M. J. (1987a). Resources for teaching about the Constitution. Social Education, 51, 350-356.

Turner, M. J. (1987b). Studying the Constitution: Capitalizing on two bicentennials [Machine-readable data file]. Reston, VA: National Association of Secondary School Principals (Producer). Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Distributor).

Vars, G. F. (1978). Bibliography of research on the effectiveness of block-time, core, and interdisciplinary team teaching programs. Kent, OH: Kent State University.

Wallace v. Jaffree, 472 U.S. 38 (1985).

Wasson, D. L. (1991). Educating the citizen. Adult Learning, 2(6), 27-28.

Wease, H. (1986). Teaching about the United States Constitution in the bicentennial period [Machine-readable data file]. Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education (Producer and Distributor).

Webster's New World Dictionary. (1990). New York: Simon & Schuster.

West Virginia Board of Education v. Barnette, 319 U.S. 628 (1943).

Westside Community Schools v. Mergens, 496 U.S. 226, 110 L.Ed.2d 191, 110 S.Ct. 2356 (1990).

White, C. S. (1988). The U.S. Constitution then and now. Social Education, 52, 61-62.

Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

Wood, J. E. (1985, Winter). Equal Access: A new direction in American public education. Journal of Church and State, pp. 5-17.

Zakariya, S. B. (1985). Here's how boards are coping with the Equal Access Act. American School Board Journal, 172(5), 37-39.

Zorach v. Clauson, 343 U.S. 306 (1952).

APPENDIX A:

The Equal Access Act

THE EQUAL ACCESS ACT
(20 U.S.C. §§4071-74)

DENIAL OF EQUAL ACCESS PROHIBITED

Sec. 4071.(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

Sec. 4072. As used in this subchapter--

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

Sec. 4073. If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

CONSTRUCTION

Sec. 4074. The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

APPENDIX B:

Club System at Westside High School (1985)

WESTSIDE HIGH SCHOOL STUDENT ACTIVITIES

August, 1984

BAND--This activity is included in our regular curriculum. Extensions of this activity include Marching Band, Ensembles, Pep Band, and Concert Jazz Band. Performances, presentations, and programs are presented throughout the school year.

CHESS CLUB--This activity is for those interested in playing chess. Opportunities to play are held after school throughout the school year.

CHEERLEADERS--A girls sport cheerleader team is made up of a junior varsity and varsity. The boys sport cheerleaders consist of sophomores, junior varsity, and varsity. Tryouts for these spirit groups are held each spring.

CHOIR--This is a course offered as part of the curriculum. Extensions of this class include Boys and Girls Glee, Warrior Voices, and Concert and Chamber Choirs. Membership in these activities are determined by enrollment and tryouts.

CLASS OFFICERS--Voting and selection of junior and senior class officers for the following year are held each spring. Students interested in being a class officer will need to secure support, be willing to make a presentation to their class, and serve their class in an officer capacity for the following year.

DISTRIBUTIVE EDUCATION (DECA)--This is an organization that is an extension of the Distributive Education class. Membership in this activity is offered to those students involved in D.E. The club for the current year is formulated at the beginning of school each fall.

SPEECH & DEBATE--This is an activity for students interested in participating on a competitive level in both speech and debate. The season begins the first week in November and continues through March.

DRILL SQUAD & SQUIRES--These are spirit groups primarily concerned with performing at half time at football and basketball games. Selection of these squads is made in the spring of each school year. These marching units are also support groups for other athletic teams.

FUTURE BUSINESS LEADERS OF AMERICA (FBLA)--This is a club designed for students interested in pursuing the field of business. It is open to any student with an interest. Membership begins in the fall of each school year.

FUTURE MEDICAL ASSISTANTS (FMA)--This is a club designed for students with an interest in pursuing any area of medicine. The organization assists in securing blood donations from individuals at Westside High School for the Red Cross. Meetings are held to inform the membership about opportunities in the medical field. Memberships are accepted at the beginning of school each fall.

INTERACT--This is a boys volunteer organization associated with the Rotary Club of America. Its basic function is to do volunteer work within the community. They are also a support and spirit group for our athletic teams. Membership is open to 11th and 12th grade boys; with membership opportunities being available in the fall of each school year.

INTERNATIONAL CLUB--This is a club designed to help students understand people from other countries and is developed through our foreign language classes. French, German, Spanish, and Latin teachers encourage membership in this organization in the fall of each year. Sponsorship of foreign students, who attend Westside, is one of their major activities.

LATIN CLUB (Junior Classical League)--This is a club designed for those students who are taking Latin as a foreign language. This club competes in competitive situations between schools and is involved with state competition as well. Students have the opportunity to join JCL beginning in the fall of each school year.

MATH CLUB--This club is for any student interested in mathematics. Meetings are held periodically during the school year.

STUDENT PUBLICATIONS--This activity includes classes offered in preparation of the yearbook (Shield) and the student newspaper (Lance). Opportunities to learn about journalism are provided for students interested in these areas. Membership in Quill and Scroll is an extension of a student's involvement in school publications.

STUDENT FORUM--Each homeroom elects one representative as a member of the student forum. Their responsibility is to provide ideas, make suggestions, and serve as one informational group to the staff and administration for student government. Selections are made for this membership in the fall of each school year.

DRAMATICS--This activity is an extension of a regular academic class. School plays, one-act plays, and musicals are provided for students with an interest and ability in these areas. Tryouts for these productions are announced prior to the selection of individuals for these activities.

CREATIVE WRITING CLUB--This is an organization that provides students, with the interest and capability, an opportunity to do prose and poetry writing. This club meets periodically throughout the year and publishes the students' work. Any student with an interest is encouraged to become a member.

PHOTOGRAPHY CLUB--This is a club for the student who has the interest and/or ability in photography. Students have an opportunity to take photos of school activities. A dark room is provided for the students' use. Membership in this organization begins in the fall of each school year.

ORCHESTRA--This activity is an extension of our regular curriculum. Performances are given periodically throughout the year. Tryouts are held for some special groups within the orchestra. All students signed up for that class have the opportunity to try out.

OUTDOOR EDUCATION--This activity is an opportunity for interested students to be involved in the elementary school Outdoor Education Program. High school students are used as camp counselors and leaders for this activity. Students are solicited to help work prior to the fall and spring Outdoor Ed Program.

SWIMMING TIMING TEAM--Offers an interested student a chance to be a part of the Timing Team that is used during the competitive swimming season. Regular season meets, invitational meets, and the metro swim meet are swimming activities at which these volunteers will work. Membership in this group is solicited prior to the beginning of the competitive season.

STUDENT ADVISORY BOARD (SAB)--Is another facet of student government. Members are elected from each class to represent the student body. These elections are held at the same time class officers are elected. Any student has an opportunity to submit their name for consideration.

INTRAMURALS--Are offered to Westside students these following times. Basketball begins the latter part of November and continues through February. Co-educational volleyball is the spring intramural activity. Announcements are made to students so they can organize and formulate teams prior to the beginning of these activities.

COMPETITIVE ATHLETICS--Westside High School offers students the opportunity to try out and participate in eighteen varsity sports. Twenty-seven different competitive teams are available for students at each grade level. The seasons when these are offered and the procedures for getting involved can be found in the Warrior Bulletin that is published and distributed in August, prior to the opening of school.

ZONTA CLUB (Z CLUB)--Is a volunteer club for girls associated with Zonta International. Approximately one hundred junior and senior girls are involved in this volunteer organization. Eleventh and twelfth grade students are encouraged to join in the fall of each school year.

SUBSURFERS--Is a club designed for students interested in learning about skin and scuba diving and other practical applications of that sport. Opportunities in the classroom and in our pool are made available for students involved in this activity. Membership is solicited in the fall and spring of each year.

WELCOME TO WESTSIDE CLUB--Is an organization for students who are interested in helping students new to District 66 and to Westside High School. Activities are held for them which are geared toward helping them become a part of our school curriculum and activities.

WRESTLING AUXILIARY--Is for girls interested in supporting our competitive wrestling team. Membership is solicited prior to the competitive wrestling season.

NATIONAL HONOR SOCIETY--Westside Honor Society is a chapter of the national organization and is bound by its rules and regulations. It is open to seniors who are in the upper 15% of their class. Westside in practice and by general agreement of the local chapter has inducted only those juniors in the upper 7% of their class. The selection is made not only upon scholarship but also character, leadership, and service. A committee meets and selects those students who they believe represent the high qualities of the organization. Induction into NHS is held in the spring of each year.

APPENDIX C:

Westside High School Board Policy 5610

Westside High School Board Policy 5610

The text of School Board Policy No. 5610 reads in its entirety as follows:

> The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.
>
> School-sponsored clubs and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the students and the school.
>
> Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.

APPENDIX D:

Teaching Plan Situations

SITUATION #1

Your group is the opening act. You are asked to role play a scene where Bridget Mergens (senior) originally thought of an idea to form a Bible Club and meet at Westside High School. One person in your group (either male or female) will play the role of Bridget Mergens--while other group members will play the role of her friends. All of you are attending a Christian rock concert. While you are at the concert, Bridget notices how many young people are there and tells her friends that she has an idea. The idea is to get together with other interested students at Westside and talk about the Bible at school. Some of her friends support the idea, some of them do not. Remember, you are at a Christian rock concert.

SITUATION #2

Your group represents the administration at Westside High School. One person each (male or female) will be one of Westside's administration team--superintendent, assistant superintendent, principal, assistant principal. Your names are Dr. Hansen, Dr. Tangdall, Dr. Findley, and Dr. Huston, respectively. You are in a meeting discussing a new piece of federal legislation called the Equal Access Act (see Appendix A). You are trying to figure out if the Equal Access Act applies to your school. Read over the Act and discuss it--most of you think it does not apply. Discuss the reasons why in presentation.

SITUATION #3

Your group is responsible for role playing a meeting between a senior who wants to start a Bible Club and various members of the Westside administration. In Act 1, one of you (either male or female) will play the role of Bridget Mergens who is excited about forming a Bible Club at school and one of you will play the role of Dr. Findley, Westside principal. Dr. Findley, initially you agree to the students meeting, but then you ask Bridget if they want to be treated like all other clubs at Westside. Bridget, you explain that they do and plead your case to the principal. Dr. Findley tells Bridget she cannot start an "official" Bible Club at school because of "the separation of Church and State." He says, "I'm sorry, Bridget." The rest of the group will role play the other Westside administrators who ultimately give Bridget the same response--"I'm sorry, Bridget."

SITUATION #4

Your group will role play the final scene to the class. You will simulate a School Board meeting where Bridget Mergens (senior) tries to persuade the School Board to overturn the decisions of other school administrators and allow a new Bible Club to meet at school. One member of your group (male or female) will play a nervous Bridget Mergens as she explains to the School Board why she should be able to have a Bible Club while another group member will play Mergens' attorney, Doug Veith. Mr. Veith, you will argue at the School Board meeting that a new federal law, the Equal Access Act, requires the school to allow Mergens and other interested students to meet at school (see attached copy). Other group members will simulate members of the School Board at Westside. The School Board is very interested in what Mergens and Doug Veith have to say but votes 4-0 to uphold the administration's decision.

APPENDIX E:

Facts of Westside Community Schools v. Mergens

Bridget Mergens, senior at a public secondary school which receives federal financial assistance, attempted to gain access to school facilities during "noninstructional" time for the purpose of forming a Bible Club. Westside High School maintains a club system representing over 30 clubs (see Appendix B). The administration at the school, as well as the School Board, refused to grant to Mergens and other interested students use of school facilities because a Christian Club would not be consistent with either School Board Policy 5610 (see Appendix C) or the Establishment Clause. Further, the school contends that the proscriptions of the Equal Access Act (see Appendix A) do not apply to Westside High School because they do not maintain a "limited open forum." Bridget Mergens and the other interested Westside students maintain that at least 10 of Westside clubs are "noncurriculum related" thereby creating a "limited open forum."

The Federal District Court ruled in favor of the school by holding that Westside's clubs were all related to the curriculum placing Westside beyond the reach of the Equal Access Act. However, the Eighth Circuit Court of Appeals reversed. That Court held that the Equal Access Act did apply to Westside High School, Westside had violated the Act, and that the Act was constitutionally permissible with respect to the Establishment Clause. This case has been granted writ of certiorari by the Supreme Court and will soon be argued.

APPENDIX F:

Student Roles for Mock Trial

PETITIONER'S ATTORNEYS

You are attorneys representing Westside High School. Your clients denied Bridget Mergens and other students access to school facilities for the purposes of a Christian Bible Club. You have received copies of the Constitution, the Equal Access Act, School Board Policy 5610, the club system at Westside High School, and facts of the case. Your job is to prepare arguments that you will make before the Supreme Court. Your arguments must center on those primary documents--no witnesses may be called. You must prioritize your arguments and be concise as you have only 20 minutes to present your arguments to the Court. Keep in mind the constitutional and legal principles you have learned (even in high school). Be on your toes to answer questions at any time--Supreme Court Justices can and will interrupt you. Prepare your arguments.

RESPONDENTS' ATTORNEYS

You are attorneys representing Bridget Mergens and other Westside High School students who wish to form a Christian Bible Club at that school. You have received copies of the Constitution, the Equal Access Act, School Board Policy 5610, the club system at Westside High School, and the facts of the case. Your job is to prepare arguments that you will make before the Supreme Court. Your arguments must center and rely on those primary documents. No witnesses may be called. You must prioritize your arguments and be concise as you have only 20 minutes to present your arguments to the Court. Keep in mind the constitutional and legal principles you have learned (even in high school). Be on your toes to answer questions at any time--Supreme Court Justices can and will interrupt you. Prepare your arguments.

SUPREME COURT JUSTICES

As a way to reduce the deficit, Congress changed the number of Supreme Court Justices from nine to three. You are hearing the case of Westside Community Schools v. Mergens. You have received copies of the Constitution, the Equal Access Act, School Board Policy 5610, the club system at Westside High School, and the facts of the case. During oral arguments you may interrupt at any time with a question--as long as it is relevant to the case and your decision. Ultimately, your job is to decide the case based on federal law, the Constitution, and the facts of the case. You may confer with other Justices before and after the oral arguments. If you all agree on a decision, you will write one majority opinion. If two of you agree, you will write a majority and a dissenting opinion. If an individual Justice agrees with part of the majority opinion and disagrees with another part, they will write a "concurring in part" opinion. Base your decisions on legal and constitutional principles you have learned (even in high school).